1988

Robert L. Gleave v. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY v. The State of Utah Department of Transportation : Brief in Opposition to Certiorari

Utah Supreme Court

Robert J. Debry; Attorney for Plaintiff-Respondent and Cross Appellant Robert L. Gleave .
Paul M. Warner; Assistant Attorney General for the State of Utah; Attorney for Defendant-Respondent Utah Department of Transportation; E. Scott Savage; Michael F. Richman; Patrick J. O'Hara; Van Cott, Bagley, Cornwall & McCarthy, Attorneys for Defendants-Appellants and Cross-Respondents.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff-Respondent and Cross-Appellant, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, Defendants-Appellants and Cross-Respondents and THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendant-Respondent.	Case No. 880128

BRIEF BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ("DRGW") IN OPPOSITION TO ROBERT L. GLEAVE'S PETITION FOR CERTIORARI AND DRGW'S ALTERNATIVE CROSS-PETITION FOR CERTIORARI

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Cullen Y. Christensen, Presiding

Robert J. DeBry
4001 South 700 East, #500
Salt Lake City, UT 84107
Telephone: (801) 262-8914
Attorney for Plaintiff-Respondent and Cross-Appellant Robert L. Gleave

Paul M. Warner
Assistant Attorney General
for the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84144
Telephone: (801) 533-7627
Attorney for Defendant-Respondent Utah Department of Transportation

E. Scott Savage
Michael F. Richman
Patrick J. O'Hara
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
Telephone: (801) 532-3333
Attorneys for Defendants-Appellants and Cross-Respondents The Denver and Rio Grande Western Railroad Company and Utah Railway Company

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Salt Lake City, UT 84107
Telephone: (801) 262-8914
Attorney for Plaintiff-Respondent and Cross-Appellant Robert L. Gleave

Paul M. Warner
Assistant Attorney General
for the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 533-7627
Attorney for Defendant-Respondent Utah Department of Transportation

E. Scott Savage
Michael F. Richman
Patrick J. O'Hara
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
Telephone: (801) 532-3333
Attorneys for Defendants-Appellants and Cross-Respondents The Denver and Rio Grande Western Railroad Company and Utah Railway Company

IDENTIFICATION OF PARTIES TO THE PROCEEDING BELOW

In addition to the parties identified in the caption, there were two other defendants in the proceeding below. Defendant Gerald H. Burton was dismissed before trial pursuant to a stipulation between the parties. Defendant City of Springville, a municipal corporation, prevailed on a motion for a directed verdict (on a governmental immunity defense) made at the close of all the evidence and no parties appealed from that directed verdict. Neither Mr. Burton nor the City of Springville is affected by this appeal.

For all purposes relevant to this proceeding, defendants, appellants and cross-respondents The Denver and Rio Grande Western Railroad Company and the Utah Railway Company are similarly situated. Both railroad companies are identified in this Brief and Alternative Cross-Petition as "DRGW." The plaintiff, respondent, and cross-appellant, Robert L. Gleave is referred to herein as "Mr. Gleave." The defendant-respondent, the Utah State Department of Transportation, is identified as "UDOT". UDOT is not affected by the pending petition and alternative cross-petition.

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

First, DRGW opposes Mr. Gleave's petition for certiorari on the punitive damages question. DRGW disputes Mr. Gleave's contention that the ruling by the Court of Appeals on the punitive damages question departs from the accepted and usual course of judicial proceedings.

Second, and in the alternative, DRGW cross-petitions for certiorari on an important question of state right-of-way law. DRGW's Cross-Petition is prompted by the refusal of the District Court and the Court of Appeals to rule that the jury verdict is not supported by the evidence and must be set aside as a matter of law. The jury incorrectly attributed zero percent fault to Mr. Gleave even though undisputed evidence shows that Mr. Gleave violated DRGW's superior right-of-way at the stop sign and railroad crossing.

DRGW characterizes its cross-petition as an "alternative" cross-petition for certiorari because DRGW only wants the Supreme Court to grant DRGW's cross-petition if the Supreme Court grants Mr. Gleave's petition. If the Supreme Court denies Mr. Gleave's petition, it will not be necessary for the Supreme Court to reach the merits of DRGW's cross-petition, except as it relates to a request by DRGW for sanctions against Mr. Gleave under Rule 33 for filing a bad faith certiorari petition.

Third, an issue arises under Rule 33 of the Rules of the Utah Supreme Court because DRGW respectfully submits that Mr. Gleave's certiorari petition is either frivolous or filed

for delay. DRGW seeks an award of just damages and double costs, including a pro rata reduction of DRGW's post-judgment interest liability and reasonable attorneys' fees, for having to resist Mr. Gleave's frivolous Petition for Certiorari. DRGW made Mr. Gleave an unconditional offer of settlement of the full judgment amount plus all accumulated post-judgment interest as of February 23, 1988.

REFERENCE TO COURT OF APPEALS OPINION

The opinion of the Court of Appeals in this case is reported at 749 P.2d 660 (Ct. App. 1988). A copy of the published opinion is reproduced at Appendix Exhibit A.

JURISDICTIONAL STATEMENT

The Court of Appeals rendered its decision January 28, 1988. Mr. Gleave filed a petition for rehearing February 10, 1988 and DRGW filed a petition for rehearing February 12, 1988. Both petitions were denied February 22, 1988. After his first petition for rehearing was denied, Mr. Gleave filed with the Court of Appeals a so-called "Motion to Suspend The Rules" which, if granted, would have given Mr. Gleave the extraordinary opportunity to file a second petition for rehearing. The Court of Appeals denied Mr. Gleave's Motion to Suspend the Rules March 16, 1988. By order of March 15, 1988, the Supreme Court extended Mr. Gleave's time for filing a Petition for Certiorari to April 5, 1988. By an Amended Notice dated May 5, 1988, the Clerk of the Supreme Court notified the parties that DRGW may have thirty days from that date to file a Brief in Opposition to Mr. Gleave's Certiorari Petition and an

Alternative Cross-Petition for Certiorari. Jurisdiction of the Supreme Court is conferred by Utah Code Ann. § 78-2-2(5) (1953, as amended).

CITATIONS TO CONTROLLING LAW

The controlling law is provided by Rule 43 of the Rules of the Utah Supreme Court. Rule 43 is entitled "Considerations Governing Review of Certiorari." Mr. Gleave predicates his Petition for Certiorari on Rule 43(3), whereas DRGW predicates its Cross-Petition for Certiorari on Rule 43(4).

DRGW's request for damages caused by Mr. Gleave's frivolous Certiorari Petition must be construed in light of the mandatory sanction provisions of Rule 33 of the Rules of the Utah Supreme Court. Rule 33 is entitled "Damages For Delay or Frivolous Appeal; Recovery of Attorney's Fees."

Supreme Court Rules 33 and 43 are reproduced at Appendix Exhibit E.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a personal injury action arising from injuries sustained by Mr. Gleave April 16, 1982 when he drove his automobile into the path of an oncoming train owned and operated by the DRGW. The accident occurred at a railroad crossing in Springville, Utah, which was protected by advance warning signs, railroad crossing signs and a stop sign which required motorists to stop before proceeding across the railroad tracks. UDOT was joined as a defendant because it

allegedly breached certain statutory duties to install adequate traffic warning devices at the crossing.

In the Court of Appeals, DRGW appealed from a judgment based upon a jury verdict in favor of Mr. Gleave and it appealed an order of the lower court dismissing co-defendant UDOT prior to trial. In a cross-appeal to the Court of Appeals, Mr. Gleave appealed the lower court's order granting DRGW's motion for a directed verdict as to Mr. Gleave's claim for punitive damages.

The Court of Appeals affirmed the District Court rulings in every respect. The case comes before the Supreme Court on Mr. Gleave's Petition for Certiorari and DRGW's Alternative Cross-Petition for Certiorari. Due to its limited scope, DRGW's Alternative Cross-Petition will not affect UDOT's interests even if it is granted.

B. COURSE OF PROCEEDINGS & DISPOSITION BELOW

This action was tried before a jury in the Fourth Judicial District Court in and for Utah County, the Honorable Cullen Y. Christensen presiding. A pre-trial motion to dismiss filed by UDOT was granted on the grounds that UDOT was, in the lower court's opinion, immune from suit under the doctrine of sovereign immunity. The Court of Appeals affirmed UDOT's dismissal.

The case was submitted to the jury upon comparative negligence instructions, the court having denied DRGW's Motions for Summary Judgment (R. 460-61; 569-70) and for a directed verdict (E. 1349; 1355) requesting that Mr. Gleave be found

negligent as a matter of law. The jury returned its verdict, finding DRGW 100% at fault and Mr. Gleave 0% at fault. (R. 765-68) The lower court entered judgment against DRGW on August 15, 1984, in the amount of $439,937.87 (R. 808-09). The lower court denied post-trial motions filed by DRGW seeking, in the alternative, a new trial, judgment notwithstanding the verdict, or an alteration or amendment of the judgment.

C. STATEMENT OF FACTS

DRGW's main line tracks are crossed by a narrow, infrequently travelled, country road at 1600 South in Springville, Utah (R. 1244). In this area of Utah County, the railroad's tracks run generally in a north-south direction and, as can be seen from the numerous photographic exhibits, the grade for these tracks was established by making a long cut through a hillside which extends several hundred yards to the north from 1600 South. (Mr. Gleave's Trial Exhibits 2A-2G, 2I-2M, 47, and 48; DRGW's Trial Exhibits 22-33, and 41). This hillside causes a substantial obstruction of the view that an eastbound motorist has of a train coming from the north. However, since the hill essentially ends on the north side of 1600 South, an eastbound motorist's view to his right, or south, is relatively unobstructed (R. 1739).

The train in this instance was southbound and, since Mr. Gleave was eastbound at the time, it approached the crossing from Mr. Gleave's left. The crossing had the usual round yellow sign with a cross on it to provide an advance warning to motorists of the upcoming railroad crossing, and the

usual crossbucks at the point of the crossing to denote its location. In addition, this crossing had a stop sign (R. 1749).

Mr. Gleave testified that he knew he was approaching a railroad crossing because he had been over these tracks about three other times and because he had worked on the crossing itself as part of an asphalt paving crew in 1979 (R. 1748 and 1757). There was enough daylight so that he was not using his vehicle's headlights (R. 1748), the window on the driver's side was almost all the way up (R. 1749), and the vehicle's heater was on (R. 1743).

Mr. Gleave testified that he saw "all the warning signs on the road" as he approached the railroad crossing (R. 1749 and 1757). Although Mr. Gleave never denied that he told the investigating police officer that he had only "slowed down" for the stop sign (R. 1422--See the Officer's Report at Appendix Exhibit C), during trial Mr. Gleave testified that he came to a complete stop at the stop sign (R. 1749).

Mr. Gleave next testified that after stopping at the sign and looking left, he then looked to his right (south) and that he continued looking to the right as he started up from the stop sign towards the tracks (R. 1750). He acknowledged that his view to the left (north) was more restricted that his view to the right (south), claiming that from the stop sign he could see about 900 feet down the tracks to his right (south), but only 50-100 feet up the tracks to his left (north) (R. 1758-59). Nevertheless, he testified unequivocally that he travelled from the stop sign to a point where he could no

longer stop and avoid the collision while looking only to his right (R. 1759-60). He claimed that he heard the train whistle and saw the train as he glanced back to his left (north) while his car was moving (R. 1750) and that upon seeing and hearing the train, he immediately stopped his car (R. 1750). Mr. Gleave testified that he believes the train would not have hit his vehicle if he had stopped at the point where his vehicle was when he saw the train (R. 1775-76).

DRGW train crew member Bruce Leek testified that he first saw Mr. Gleave's vehicle creeping toward the crossing about nine seconds before the collision (R. 1813), and he saw Mr. Gleave stop with the nose of his automobile on the west rail for about 4 or 5 seconds before the automobile disappeared from his view under the nose of the engine shortly before the impact (R. 1815). He testified that the train had a "very loud" whistle and that the train's engineer sounded the whistle continuously from the quarter mile whistle post north of the 1600 South crossing until he interrupted the normal signal with an emergency blowing of the whistle that continued until the train impacted the automobile (R. 1817-1818; and 1822).

The train engineer, Gerald H. Burton, testified that the train was travelling at 50 mph, which was the designated speed for this train (R. 1396 and 1397). He saw Mr. Gleave's vehicle move slowly onto the tracks and stop (R. 1401-02) and, at that point in time, he interrupted the normal whistle signal to blow the whistle in rapid succession (R. 1402). Mr. Burton said that he thought Mr. Gleave had adequate time to remove his

vehicle from the tracks in order to prevent the accident (R. 1412).

Sergeant David Coron of the Springville Police Department testified that he investigated this accident (R. 1416-17), that he spoke with Mr. Gleave at the scene of the accident (R. 1419), and that Mr. Gleave was lucid at that time (R. 1421-22). He asked Mr. Gleave what had happened and Mr. Gleave said he "slowed down" for the stop sign (R. 1422; also Appendix Exhibit "C").

DRGW called as a witness Mr. Arthur Geurts, Safety Studies Engineer for UDOT. Mr. Geurts testified that he was responsible for UDOT's hazard index rating for all railroad crossings in the State of Utah (R. 981). The 1600 South crossing was one of 1280 crossings studied by the state and the Federal Railroad Administration. The Federal Railroad Administration initially and incorrectly ranked it as the 68th most dangerous among the 1280 crossings. In computing this ranking, the Federal Railroad Administration believed that train speeds in the area were 70 mph (R. 989-91). Mr. Geurts testified that train speeds through this crossing are only 50 mph and, by assuming 50 mph for the speed of trains in the area instead of 70 mph, the ranking of this crossing under the UDOT hazard index was changed from the 68th most dangerous to the 353rd most dangerous of the 1280 crossings surveyed (R. 982, 989-91). Moreover, Mr. Geurts explained that this UDOT evaluation was done before the stop signs were installed, which, of course, provided a motorist with additional crossing

protection and reduced the hazard (R. 983). In determining what crossing protection to require at a particular crossing, Mr. Geurts explained that UDOT considers factors such as a motorist's sight distance at the crossing, the speed and number of trains in the area, and the speed and volume of highway traffic at the crossing (R. 985-87).

Mr. Joseph Bruce Yuhas, an employee of UDOT who participated in the survey of the 1600 South crossing in October of 1974, testified that the survey team considered factors such as the sight distances and, after fully evaluating the crossing, it recommended federal funds be sought to install flashing light signals as additional crossing protection (R. 1247-49). The team further recommended that temporary stop signs be installed until federal funds for flashing signals become available (R. 1241, 1258-59).

ARGUMENT

I.
MR. GLEAVE'S PETITION SHOULD BE DENIED

As DRGW understands the purpose of a Petition for Certiorari, it is not to argue the merits of the proposed appeal. Rather, the purpose is to provide the Court information as to why the Certiorari Petition should be granted. DRGW accordingly has limited the scope of the argument in this Brief and Alternative Cross-Petition.

Relying on Rule 43(3) of the Rules of the Utah Supreme Court, Mr. Gleave wants this Court to grant his Certiorari Petition on the punitive damages question. Petition for Certiorari at 13. Mr. Gleave claims that the Court of Appeals

rendered a decision on the punitive damages question "that has so far departed from the accepted course of judicial proceedings . . . as to call for the exercise of this Court's power of supervision . . . ." Nothing in Mr. Gleave's Certiorari Petition supports that strong contention.

The Court of Appeals ruled that, "Before punitive damages may be awarded, the plaintiff must prove conduct that is willful and malicious or that manifests a knowing and reckless indifference toward, and disregard of, the rights of others." 749 P.2d at 670 (citations omitted). Although DRGW thinks that the malice-in-law/reckless punitive damage standard may not apply to this case, the Court of Appeals gave Mr. Gleave the benefit of the doubt and applied that generous standard instead of the more demanding malice in fact/willful standard. Significantly, whatever DRGW might think about the standard, Mr. Gleave does not contend that the Court of Appeals adopted the wrong legal standard for awarding punitive damages.

In reviewing the directed verdict in favor of DRGW, the Court of Appeals applied the standard of review most favorable to Mr. Gleave. That is, the Court viewed all of the evidence in the record in a light most favorable to Mr. Gleave. Having done that, the Court concluded that, at most, the evidence supported a reasonable jury conclusion that DRGW had been negligent. "But," the Court explained, "evidence of simple negligence alone does not support an award of punitive damages." 749 P.2d at 670.

Mr. Gleave does not take issue with the Court of Appeal's legal standard for awarding punitive damages, nor does Mr. Gleave take issue with the standard of review used by the Court of Appeals in affirming the directed verdict. He just dislikes the result. Stripped to its essentials, Mr. Gleave's Petition for Certiorari amounts to nothing more than a bad faith request that the Supreme Court duplicate the thorough job of appellate review that has already been done by the Court of Appeals.

Rule 43 of the Rules of the Utah Supreme Court provides: "Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Mr. Gleave has failed to provide the Supreme Court even one good reason to justify granting his Certiorari Petition.

Mr. Gleave's Petition for Certiorari is written as if it were a Brief on the merits. At pages 2-13 of his Petition for Certiorari, Mr. Gleave indulges in broad-brush arguments concerning selected evidence, including evidence that is not even in the trial record. The evidence argued by Mr. Gleave that is not in the record pertains to alleged "near misses" (perhaps a better term would be "non-accidents"). The Court of Appeals notes: "Mr. Gleave's attorney claimed he would offer evidence at trial of 'near misses' at the crossing, but none was produced." 749 P.2d at 671.

DRGW concedes that Mr. Gleave at trial did offer evidence of alleged near misses, and that the trial court

excluded that evidence. Mr. Gleave made a proffer of the excluded evidence. However, after judgment was entered and DRGW appealed and Mr. Gleave cross-appealed, Mr. Gleave did not raise as a cross-appeal issue the exclusion of the so-called near-miss evidence. Since Mr. Gleave did not appeal from the exclusion of the near-miss evidence, the Court of Appeals did not receive Briefs or hear oral arguments bearing on the propriety of excluding the proffered near-miss evidence. Mr. Gleave has waived his right to appeal from the exclusion of the near-miss evidence. Ignoring his own waiver, Mr. Gleave now wants to argue that punitive damages should be awarded based on evidence which is not in the record and which is not involved in any issue on appeal.

Mr. Gleave also makes much of the fact that a certain aerial photograph marked Exhibit 8 at trial was not transmitted to the Court of Appeals by the District Court. Exhibit 8 is an unusually large exhibit, approximately 3 1/2 feet by 3 1/2 feet square. As Mr. Gleave's lawyer well knows, it is not customary for the Clerk of a District Court to transmit unusually large exhibits to an appellate court unless special arrangements are made by counsel for transmittal of the oversized exhibits. Mr. Gleave failed to comply with Rule 12(b)(3) of the Rules of the Utah Court of Appeals which provides: "Exhibits of unusual bulk or weight other than documents shall not be transmitted by the clerk unless directed to do so by a party or by the Clerk of the Court of Appeals. A party must make advance arrangments

with the clerks for the transportation and receipt of exhibits of unusual bulk or weight." Id. (emphasis added).

But even if we can assume that Mr. Gleave was not at fault in connection with Exhibit 8, the most Mr. Gleave can demonstrate is harmless error. It is absurd for Mr. Gleave to contend, as he apparently does contend, that the Court of Appeals would have reached a different result on punitive damages in this case if it had looked at the aerial photograph. Not only did the Court of Appeals have the opportunity to review several hundred pages of trial testimony, it also had the benefit of numerous smaller photographic exhibits, including a video tape of the subject crossing played by Mr. Gleave's lawyer at oral arguments before the Court of Appeals.

Mr. Gleave claims that Exhibit 8 somehow irrefutably "proves" that the location of the subject crossing was less rural than the Court of Appeals thought it to be. In fact, the aerial photograph was cumulative evidence that added nothing new to all of the other evidence adduced at trial concerning the particular details about the subject crossing. The photograph changes nothing. No evidence in the record, including the large aerial photograph marked Exhibit 8 at trial, is inconsistent with the findings by the Court of Appeals that "locality was rural and the road not heavily traveled." 749 P.2d at 671. If the location is not rural, perhaps Mr. Gleave can explain the undisputed presence of a large tin barn at the southwest corner of the crossing.

Besides, the ultimate issue on punitive damages does not turn on whether the crossing was in a very rural area or in a slightly developing rural area. The ultimate issue is whether DRGW's conduct went beyond negligence to satisfy the legal standard for punitive damages. In affirming the directed verdict on punitive damages, the Court of Appeals followed "the general rule" which provides "that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases." 749 P.2d at 671 (citation omitted) (emphasis in original).

No public objective would be advanced by granting Mr. Gleave's Petition for Certiorari. First, it would be bad policy to introduce punitive damages into a case where the evidence shows negligence at most. Second, as a matter of law, the Court can take judicial notice that DRGW is subject to ongoing administrative regulation by the Utah Public Service Commission, UDOT, the Interstate Commerce Commission, and the Federal Railroad Administration. Moreover, as the Court of Appeals correctly held in this case, under applicable Utah statutes, "The government alone must consistently regulate safety devices at railroad crossings, determine which devices at which crossings should be recommended for federal funding, rank crossings in order of need for upgrading in light of limited funds for that purpose, and apportion signal installation costs between public and private entities. As a practical matter, the private sector cannot perform those functions." 749 P.2d at 667-68.

The uncontroverted evidence in the record in this case is that all crossings throughout the State of Utah are systematically evaluated and upgraded by UDOT as federal monies become available. The appropriate state and federal agencies are acutely aware of the risks to operators of motor vehicles at railroad crossings. Every year millions of dollars are appropriated by the appropriate agencies for purposes of inspecting and, to the extent funds are available, upgrading safety at particular crossings.

II.
DRGW'S ALTERNATIVE CROSS-PETITION SHOULD BE GRANTED IF THE COURT GRANTS MR. GLEAVE'S PETITION: AS A MATTER OF LAW, MR. GLEAVE COULD NOT HAVE BEEN ENTIRELY WITHOUT FAULT

If this Court grants Mr. Gleave's Petition, then DRGW alternatively cross-petitions on an important issue of state right-of-way law. DRGW's Alternative Cross-Petition seeks an ultimate ruling by this Court that the verdict must be set aside because Mr. Gleave had to have been at least 1% negligent as a matter of the undisputed evidence and applicable right-of-way law. The Court of Appeals erred in refusing to hold that a motorist in Utah is at least 1% negligent as a matter of law if he admits to driving out in front of a train, at a crossing marked with a stop sign, without first looking both ways and particularly in the direction of greatest visual obstruction.

For purposes of this Alternative Cross-Petition for Certiorari, DRGW is not asking the Supreme Court to completely

rehear every contention raised before the Court of Appeals by DRGW. DRGW may disagree with some of the ultimate legal conclusions reached by the Court of Appeals in this case, but DRGW is only seeking further review of one of those legal conclusions. At this level of review, DRGW only seeks a holding by this Court that Section II of the opinion issued in this case by the Court of Appeals, 749 P.2d at 664-66, is wrong.

A. MR GLEAVE WAS AT LEAST 1% NEGLIGENT BECAUSE HE VIOLATED HIS ABSOLUTE DUTY TO YIELD THE RIGHT OF WAY TO THE TRAIN

Both as a matter of Utah statutory and common law, DRGW absolutely and unquestionably enjoyed a superior right of way at the crossing where Mr. Gleave caused the accident. See Utah Code Ann. §§ 41-6-72.10, 41-6-95, 41-6-97, 41-6-99 (1953, as amended) (reproduced at Appendix Exhibit D). DRGW had the right of way because it is a train and because the crossing had a stop sign for motorists like Mr. Gleave. By violating DRGW's superior right of way, the jury was obligated to find, but did not find, that Mr. Gleave was at least 1% negligent. To find Mr. Gleave entirely without fault, as the jury did, the jury had to have completely ignored the lower court's instructions concerning an autoist's absolute and non-waivable duty at a stop sign to yield the right of way to an oncoming train.

DRGW respectfully petitions the Supreme Court to decide this fundamental question of right-of-way law. The decision on Mr. Gleave's negligence rendered by the Court of Appeals in this case is inconsistent with, cannot be squared

with, and is not supported by the numerous Utah Supreme Court railroad crossing cases and statutes. The cited cases and statutes establish the minimum legal standard for "reasonable" conduct of motorists approaching railroad crossings in Utah. Mr. Gleave fell below the minimum standard of care. The opinion issued by the Court of Appeals does not directly or correctly analyze the many cases and statutes which compel a finding that Mr. Gleave was at least 1% negligent as a matter of law.

B. THE UNDISPUTED FACTS SHOW THAT MR. GLEAVE DIDN'T LOOK BOTH WAYS BEFORE CROSSING THE TRACKS

The opinion released by the Court of Appeals in this case does not explain how Mr. Gleave can be found entirely without any fault under circumstances where he admitted that he pulled out in front of the train while looking to his right, knowing all along that the real area of visual obstruction and danger was to his left. DRGW submits that it was plain error for the Court of Appeals to sustain the jury verdict finding 0% fault under these facts.

Even though Mr. Gleave had actual and present knowledge that he was about to drive across railroad tracks, he admitted that he proceeded across the tracks looking to his right (south) and that he continued looking to the right as he started up from the stop sign toward the tracks (R. 1750). He admitted that he knew his view to the left (north) was more restricted that his view to the right (south). He said that

from the stop sign he could see about 900 feet down the tracks to his right (south) but only 50 to 100 feet up the tracks to his left (north) (R. 1758-59). Nevertheless, while still looking right, he testified that he traveled from the stop sign to a point where he could no longer stop and avoid the collision. (R. 1759-60). Mr. Gleave admitted that only after it was too late to prevent the accident that he finally "glanced back to the left" and saw the train (R. 1750).

Under all the circumstances, the uncontested evidence is that Mr. Gleave proceeded across the tracks with his eyes foolishly glued to his right for an inordinately and dangerously long period of time, even though he knew the area to his left was the most obstructed and thus the area of greatest potential danger.

The uncontroverted evidence shows that Mr. Gleave proceeded across the tracks into the path of the train without first looking both ways, causing at least 1% of his accident. A new trial is necessary to allow a jury to quantify the amount of Mr. Gleave's negligence compared to the negligence, if any, attributable to DRGW.

III.
RULE 33 SANCTIONS AGAINST MR. GLEAVE ARE APPROPRIATE IN THIS CASE

With respect to DRGW's request for sanctions against Mr. Gleave, in the interests of brevity, DRGW invites the attention of the Court to Appendix Exhibit E and Appendix Exhibit F.

Appendix Exhibit E is a copy of Rule 33 of the Rules of the Utah Supreme Court, including the Advisory Committee Note to Rule 33. The Advisory Committee Note makes clear that the imposition of sanctions is mandatory if the Court finds that an appeal was frivolous or filed for delay.

Appendix Exhibit F is a copy of a letter dated March 30, 1988 from DRGW's counsel to Mr. Gleave's counsel. That letter put Mr. Gleave on notice that DRGW would seek sanctions for bad faith delay and it confirms the $625,868.81 unconditional offer of settlement made by DRGW to Mr. Gleave February 23, 1988. Appendix Exhibit F is self-explanatory. DRGW made its unconditional offer the day after the Court of Appeals denied Mr. Gleave's and DRGW's respective rehearing petitions.

As set forth in the letter and in this Brief and Alternative Cross-Petition, Mr. Gleave's stubborn refusal to drop his punitive damage claim is not in good faith. Both the District Court and the Court of Appeals adopted the forgiving legal standard for punitive damages favored by Mr. Gleave, and both lower courts reviewed all the evidence on punitive damages in a light most favorable to him before granting DRGW's Motion For Directed Verdict.

Under all the circumstances, DRGW requests relief from the Supreme Court for Mr. Gleave's bad faith. Specifically, DRGW seeks an order that DRGW does not have to pay any post-judgment interest to Mr. Gleave from and after the unconditional offer of settlement made to Mr. Gleave February

23, 1988. Additionally, DRGW seeks an award of double costs and attorney's fees in connection with resisting Mr. Gleave from and after February 23, 1988. If requested by the Court, DRGW will submit an affidavit on attorney's fees.

CONCLUSION

For the foregoing reasons, DRGW urges this Court to deny Mr. Gleave's Petition for Certiorari. This Court should also grant DRGW's Motion to impose Rule 33 sanctions on Mr. Gleave for a bad faith appeal. In the alternative, if this Court grants Mr. Gleave's Petition, DRGW respectfully requests that this Court also grant DRGW's Cross-Petition for Certiorari.

DATED this 6th day of June, 1988.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. Scott Savage
Michael F. Richman
Patrick J. O'Hara

By Patrick J. O'Hara
Attorneys for Defendants-Appellants and Cross-Respondents The Denver and Rio Grande Western Railroad Company and Utah Railway Company
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing BRIEF BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ("DRGW) IN OPPOSITION TO ROBERT L. GLEAVE'S PETITION FOR CERTIORARI AND DRGW'S ALTERNATIVE CROSS-PETITION FOR CERTIORARI, were mailed, postage prepaid, this 6th day of June, 1988, to the following:

Robert J. DeBry
4001 South 700 East, #500
Salt Lake City, UT 84107
Telephone: (801) 262-8914
Attorney for Plaintiff-
Respondent and Cross-
Appellant Robert L. Gleave

Paul M. Warner
Assistant Attorney General
for the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84144
Telephone: (801) 533-7627
Attorney for Defendant-
Respondent Utah Department of
Transportation

Patrick J. O'Hara

APPENDIX

Attached hereto are the following exhibits:

EXHIBIT "A": Gleave v. Denver and Rio Grande Western Railroad Company, 749 P.2d 660 (Utah Ct. App. 1988)

EXHIBIT "B": Order Granting Directed Verdict Regarding Punitive Damages

EXHIBIT "C": State of Utah Investigating Officer's Report of Traffic Accident

EXHIBIT "D": Selected Utah Right-of-Way Statutes for Motor Vehicles

EXHIBIT "E": Rules 33 and 43 of the Rules of the Utah Supreme Court

EXHIBIT "F": Letter dated March 30, 1988 from counsel for DRGW to counsel for Mr. Gleave confirming DRGW's unconditional offer of settlement and complaining about bad faith delay from and after February 23, 1988

67730

Exhibit A

We affirm, but remand for the purpose of taking additional evidence of the value of the fifty-foot strip and for entry of judgment accordingly. No costs awarded.

STEWART, Associate C.J., and HOWE, DURHAM and ZIMMERMAN, JJ., concur.

Robert L. GLEAVE, Plaintiff and Respondent and Cross-Appellant,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, and Utah Railway Company, a corporation, Defendants and Appellants and Cross-Respondents,

and

State of Utah, Department of Transportation, Defendant and Respondent.

Nos. 860057-CA, 860058-CA.

Court of Appeals of Utah.

Jan. 28, 1988.

Rehearing and Reconsideration Denied Feb. 22, 1988.

Motorist brought action against railroad company and State Department of Transportation for injuries sustained in collision with train. The Fourth District Court, Utah County, Cullen Y. Christensen, J., dismissed Department from case and after trial entered judgment for motorist and appeal was taken. The Court of Appeals, Jackson, J., held that: (1) statute giving State Department of Transportation ultimate responsibility for railroad crossing design and warning and safety devices did not relieve railroad of its duty to operate trains with reasonable care and maintain its right-of-way; (2) evidence was sufficient to support finding that railroad breached its duty of reasonable care to motorist and that motorist was not contributorily negligent; and (3) installation, maintenance and improvements of safety signals or devices at railroad crossing was governmental function immune from suit under state Governmental Immunity Act.

Affirmed.

1. **Railroads** ⇐310

Statute giving State Department of Transportation ultimate responsibility for crossing design and warning and safety devices at railroad crossing did not relieve railroad company of duty to operate trains with reasonable care, nor did it prohibit railroad from exercising reasonable care in operation of its trains and maintenance of its right-of-way. U.C.A.1953, 54-4-15(2, 4), 54-4-15.1.

2. **Railroads** ⇐348(5)

Expert testimony that due to crossing angle, mound of earth, vegetation and curving railroad track, driver proceeding east on road could see only 285 feet of track to north when stopped at existing stop sign at railroad crossing, that train that hit motorist's car was traveling at 50 miles per hour, the speed set by railroad, and that driver with front end of his car even with stop sign could not see train moving at 50 miles per hour until it was four seconds away from crossing was sufficient to support finding that railroad company breached its duty of reasonable care and was negligent toward motorist struck by train, notwithstanding fact that railroad did install stop sign to supplement yellow railroad crossing sign and X-shaped crossbuck.

3. **Railroads** ⇐348(8)

Evidence was sufficient to support finding that motorist exercised reasonable care at railroad crossing by stopping vehicle at established stop sign and looking for train and yet failed to see oncoming train until it was too late to avoid collision, and thus motorist was not contributorily negligent in collision; motorist was not required to inch his car forward past estab-

lished stop sign to stop second time in narrow and precarious zone which afforded no greater degree of safety when train approaching at 50 miles per hour was close but still out of view.

4. States ⇐112.2(2)

State Department of Transportation's regulation of public safety needs and evaluation, installation, maintenance and improvement of safety signals and devices at railroad crossings was governmental function immune from suit under state Governmental Immunity Act. U.C.A.1953, 63-30-3.

5. States ⇐112.2(2)

State Department of Transportation's failure to install different safety signals or devices at railroad crossing was purely discretionary function within meaning of discretionary function exception to waiver of immunity under state Governmental Immunity Act. U.C.A.1953, 63-30-10(1)(a).

6. Damages ⇐208(8)

If there is no evidence to justify punitive damages, issue is properly withheld from jury, but if reasonable inferences supporting judgment for losing party could be drawn from evidence presented at trial, directed verdict as to punitive damages cannot be sustained, even if reasonable persons might reach different conclusions on punitive damage issue after considering evidence and reasonable inferences therefrom.

7. Damages ⇐91(1)

Before punitive damages may be awarded, plaintiff must prove conduct that is willful and malicious or that manifests knowing and reckless indifference toward, and disregard of, rights of others.

8. Damages ⇐91(3)

Evidence of simple negligence alone does not support award of punitive damages.

9. Damages ⇐87(1)

General rule is that only compensatory damages are appropriate and punitive damages may be awarded only in exceptional cases.

10. Railroads ⇐349

Railroad's failure to take corrective steps to remedy dangerous conditions at railroad crossing, which resulted in motorist sustaining serious injuries when struck by train, was result of simple negligence, and not result of either actual or implied malice, and thus motorist was not entitled to punitive damages.

11. Statutes ⇐181(1), 212.6

In construing legislation Court of Appeals must give effect to legislature's underlying intent, and assume that each term in statute was used advisedly.

12. Statutes ⇐189

Court of Appeals will interpret and apply statute according to its literal wording unless it is unreasonably confused or inoperable.

13. Statutes ⇐184

Proper construction of statute's terms must further statute's purpose.

14. Interest ⇐39(2.5)

Statute providing for prejudgment interest limited special damages on which prejudgment interest was recoverable to those that arose in period between act giving rise to cause of action and entry of judgment in plaintiff's favor, and did not allow prejudgment interest on all types of special damages such as those that would arise subsequent to entry of judgment. U.C.A.1953, 78-27-44.

Robert J. Debry (argued), Robert J. Debry & Associates, Salt Lake City, for Robert L. Gleave.

E. Scott Savage (argued), Patrick J. O'Hara, Michael F. Richman, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, for Denver & Rio Grande Western R. Co.

William Bannon (argued), Paul Warner, Asst. Atty. Gen., Salt Lake City, for UDOT.

Before JACKSON, BENCH and GARFF, JJ.

OPINION

JACKSON, Judge:

This action arises from a collision between an eastbound motor vehicle driven by Robert L. Gleave and an empty southbound coal train operated by an agent of the Denver & Rio Grande Western Railroad Company. The accident occurred at daylight on April 16, 1982, at the crossing of 1600 South Street in Springville, Utah, and the railroad tracks. Gleave suffered severe personal injuries, and his vehicle was demolished. He filed this personal injury action, and a jury awarded him damages of $425,140.00 against the defendants Denver & Rio Grande Western Railroad Company and Utah Railway Company, which we will refer to collectively as Rio Grande. The jury did not attribute any negligence to Gleave. Before trial, the Utah Department of Transportation ("UDOT") was dismissed from the case on sovereign immunity grounds.

Rio Grande's appeal presents three substantial issues:[1] (1) was Rio Grande relieved of its duty to Gleave because regulation and control of safety signals and devices at railroad-highway crossings is the state's "exclusive" preempted domain? (2) was Gleave negligent as a matter of law? and (3) did the trial court err when it dismissed UDOT on grounds of sovereign immunity? Gleave has cross-appealed on two points: (4) did the trial court erroneously grant Rio Grande's motion for a directed verdict on Gleave's claim for punitive damages? and (5) did the trial court err in denying prejudgment interest on Gleave's award of damages for lost future earnings and earning capacity?

We affirm the judgment.

I. DUTY OF RAILROAD COMPANY

Rio Grande argues that "the joint jurisdiction of these state agencies [i.e., UDOT and its reviewing agency, the Utah Public Service Commission] over the signs and control devices at railroad crossings remains *exclusive* and a private party, such as a railroad, has no more right to change the traffic protection signs at a public railroad crossing, than it would to change any other signs on a public highway." Rio Grande's "exclusivity" conclusion is based on its interpretation of Utah Code Ann. §§ 54-4-15(2), (4) and 54-4-15.1 (1986).[2] In other words, Rio Grande claims it does not have any duty to the public because the duty has been *preempted* by the state. Gleave argues that it makes no difference who had the duty to install signs and signals at the collision crossing because that issue was not presented to the jury and because the jury decided that Rio Grande breached duties other than a duty to install better signs or control devices.

[1] Rio Grande's attempt to hide behind the statutes motivates us to seek further. Does not our law impose a basic duty of reasonable care and prudence upon Rio Grande, regardless of any statutory duty?

1. Rio Grande also claimed it was entitled to have the jury instructed that it could reduce Gleave's damages if it found that he failed to mitigate his damages by not wearing a seat belt. That issue was recently resolved adversely to Rio Grande's position in *Hillier v. Lamborn*, 740 P.2d 300, 303-04 (Utah App.1987).

2. Utah Code Ann. § 54-4-15(2) and (4) (1986) provide:

> (2) The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection ... of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety....
>
> ....
>
> (4) The commission shall retain exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section.

Utah Code Ann. § 54-4-15.1 (1986) provides:

> The Department of Transportation so as to promote the public safety shall as prescribed in this act provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state.

We think so In the landmark case of *English v Southern Pac Co*, 13 Utah 407, 45 P 47 (1896), the railway company pressed the same argument The statute in question imposed upon railway companies the duty of ringing bells and sounding whistles when trains approached public crossings The railroad argued that timely operation of bells and whistles was sufficient and "no additional duty was imposed under any circumstances, [sic] to prevent injury" *Id* at 416, 45 P at 49 Enroute to adopting the general rule in *English*, the supreme court observed

> [I]n some cases it has been held that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be shown that such crossing is more than ordinarily hazardous

Id at 419, 45 P at 50 But the court ended its analysis without embracing the "more than ordinarily hazardous" idea and held instead that the reasonable care and prudence to be used must depend upon the facts of each case

> [W]hile the statutes of Utah make some provision for the safety of the public while crossing tracks when crossing over the public thoroughfares , yet these statutes will not relieve the railroad company from adopting such *other reasonable measures for the public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case*

Id at 420, 45 P at 50 (emphasis added)

In *Bridges v Union Pac R R Co*, 26 Utah 2d 281, 488 P 2d 738 (1971), plaintiffs focused on the *English* commentary and argued that the railroad company was negligent because the crossing was "more than ordinarily hazardous" and the company knew it but failed to install adequate signals to warn the public of danger Apparently intrigued by that argument, the *Bridges* court cited *English*, adopted the commentary, and expanded the holding

> To authorize a jury to find negligence on the part of the railroad in not taking additional precautions there must be evidence to indicate that the crossing was more than ordinarily hazardous, i e , there must be something in the configuration of the land, or in the construction of the railroad, or in the structures in the vicinity, or in the nature or amount of the travel on the highway, or in other conditions, which renders the warning employed at the crossings inadequate to warn the public of danger

Id at 283, 488 P 2d at 739 In a recent per curiam decision of the Utah Supreme Court, this language from *Bridges* was quoted *Hobbs v Denver & Rio Grande W R R*, 677 P 2d 1128, 1129 (Utah 1984) Thus, the "more than ordinarily hazardous" doctrine rode the legal rails into railroad crossing negligence law in Utah, and we are required to apply that doctrine at this time [3]

We believe Gleave more accurately describes what happened at trial The jury was specifically instructed that UDOT was statutorily given ultimate responsibility for crossing design and warning and safety devices and that, accordingly, it could *not* find Rio Grande negligent "based upon any defects which might exist with respect to the design of the 1600 South crossing or based upon any problems you may perceive in the lack of traffic warning devices

3. Although this doctrine is unnecessary and confusing it makes no difference in the present case See the unpublished opinion of U S District Judge Bruce A Jenkins in *Wilde v Denver & Rio Grande W R R Co*, No C-83-149J, slip op at 16 (D Ut April 3 1985) [Available on WESTLAW 1985 WL 17370]

> In conclusion the court would be remiss if it did not express its criticism of the doctrine of the more than ordinarily hazardous' crossing The Utah Supreme Court should, at its first opportunity examine the doctrine with an eye to eliminating it The court believes that instructing a fact finder that it cannot find a railroad negligent for operating a train through a crossing without taking additional precautions unless it first finds that the warnings at the crossing were inadequate to warn the public adds nothing—except perhaps confusion—to an instruction that the railroad has a duty to operate its trains with reasonable care If the warnings are adequate, a jury would find that a reasonable person would not add additional warnings A special doctrine is not necessary

there. The jury proceeded to find that the crossing in this case was "more than ordinarily hazardous." Once past that threshold, the jury was obligated to decide whether Rio Grande exercised reasonable care in driving the train across this roadway, given the crossing's design, its physical characteristics, and the existing warning signs.[4]

The statute relied upon by Rio Grande does not relieve it of the duty to operate trains with reasonable care, nor does it prohibit Rio Grande from exercising reasonable care in the operation of its trains and the maintenance of its right-of-way. Rio Grande cannot ignore the public peril at a more than ordinarily hazardous crossing and excuse itself until UDOT takes action to upgrade the safety devices at the 1600 South crossing. Rio Grande remains subject to a standard of reasonable care which, under the circumstances at this crossing, could require actions to reduce the risks imposed on the public.

[2] Two experts testified that conditions at this crossing made it extraordinarily dangerous. Due to the crossing angle, a mound of earth, vegetation, and a curving track, a driver proceeding east on the road could see only 285' of track to the north when stopped at the existing stop sign. Rio Grande admitted before trial that the train that hit Gleave's car was travelling at 50 mph, the speed limit set by the railroad. A driver with the front end of his car even with the stop sign could not see a train moving at 50 mph (approximately 74' per second) until it was 4 seconds away from the crossing. Moreover, an audiologist testified that a train whistle would not warn a motorist until about 3 seconds before the train crossed the road. The whistle sound would be absorbed by the mound of earth and vegetation in the curvature of the track.

Rio Grande did install a stop sign to supplement the round yellow railroad crossing sign and the X-shaped crossbuck. But Rio Grande did not introduce evidence of other affirmative action to reduce the risks at this crossing, such as straightening the track, lowering the dirt mound, removing obstructive vegetation, or lowering train speed. The jury could thus reasonably find that Rio Grande breached its duty of reasonable care and was, therefore, negligent toward Gleave.

II. EVIDENCE OF GLEAVE'S LACK OF NEGLIGENCE

[3] In its special verdict, the jury specifically found no negligence on the part of Gleave. Rio Grande filed a motion for a new trial under Utah R.Civ.P. 59(a)(6), claiming that the evidence was insufficient to support this part of the verdict.

On appeal, the trial court's denial of Rio Grande's motion must be sustained if there is an evidentiary basis for the jury's decision. *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982). Viewing the evidence in the light most favorable to the verdict, we will reverse the court's ruling only if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *Id.* (quoting *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977)).

Gleave testified that he pulled up to the stop sign and stopped his vehicle. He then looked to the left (north) and saw a dirt mound with weeds on it and 50–100' of track but no train approaching; then he looked to the right (south), where he saw no train in his unobstructed view three hundred yards down the track. Making his decision to proceed while still looking southward, he began moving his vehicle forward slowly and glanced back to the left, seeing the train rapidly bearing down on him and hearing its whistle for the first

4. [R]ights and duties of a traveler and of a railroad company at crossings are mutual and reciprocal. . . . [A] railroad company, merely because it is the favored traffic, [may not] carelessly and heedlessly operate its trains over crossings at an unusual and excessive speed and without giving adequate warnings, or create a misleading set of circumstances and rely upon the assumption that the traveling public may look out for their safety and keep out of the way of the trains.
Toomer's Estate v. Union Pac. R.R. Co., 121 Utah 37, 58–59, 239 P.2d 163, 173 (1951).

time. At that point in time, which Gleave estimated was 2–3 seconds before impact, Gleave testified his car was 3–4' from the track. Deciding he could not cross the tracks safely in light of the train's speed, Gleave braked. But by the time the car stopped, it was approximately 1' from the track. Although he then tried to put the car in reverse, he was hit by the train before he succeeded in shifting gears because the train engine overhangs the track by considerably more than twelve inches.

Van Wagoner, an engineer who evaluates railroad crossing designs, testified that the one at 1600 South in Springville is the worst out of thousands of crossings he had seen that were controlled with stop signs. According to Van Wagoner, the stop sign creates an expectancy in drivers that, if they stop there, they will have sufficient visibility of any hazard to allow them to make a decision about proceeding and sufficient time to then proceed and clear the hazard. That expectancy is not met at the subject crossing because a driver stopped at the stop sign, who does not know the train's actual speed, can only see 285' up the track to the north. If the driver sees no train coming from that direction, the decision is made to proceed while continuing to be watchful for approaching trains. However, it takes a few seconds to react and make this decision, a few more for the car to accelerate, and a few more to move the car over the tracks and completely out of danger. According to Van Wagoner, this process takes 9.1 seconds from the stop sign, based on conditions at this crossing. Such a driver is 100 percent certain to be hit by a train moving at 50 mph (approximately 74' per second) if the train is fewer than 670' away from the crossing when the 9.1 second process begins. Even if the driver could cross the tracks in only 8 seconds, collision would be inevitable if the 50 mph train was any closer than 590' away when the process began. The driver is trapped because, by the time the 50 mph train is visible, there is not enough time to continue and cross the tracks safely or to stop the car, change gears, and back up out of the train's path.

On appeal, Gleave does not deny that he had a duty to exercise reasonable care in operating his vehicle over the railroad crossing; instead, he says the evidence shows he carried out that duty.

> The law requires that a traveler, approaching a railroad crossing, look and listen, and, if necessary, stop to avoid being injured by trains. This is his duty at all times and on all occasions, whether his view be obstructed or unobstructed, and the greater the hazard or danger surrounding him, the greater is the care required of him.

Lundquist v. Kennecott Copper Co., 30 Utah 2d 262, 266, 516 P.2d 1182, 1184 (1973). Rio Grande argues that Gleave's own testimony shows him to be negligent as a matter of law because he did not stop a second time at a point where he was close enough to the track to see further northward, but far enough from the track that a passing train would still clear the front end of his car.

> A plaintiff is contributorily negligent as a matter of law, if all reasonable minds would conclude that he failed to use the degree of care which an ordinary, reasonable, and prudent person would have observed for his own safety under the circumstances.

Id. at 266, 516 P.2d at 1185. Based on all the evidence in the record, we hold that Gleave's conduct was not negligent as a matter of law. All reasonable minds would not necessarily conclude that Gleave failed to exercise reasonable care under the circumstances he faced.

Van Wagoner testified that a driver who moved his car several feet beyond the stop sign and stopped with the front end at a spot 10' from the rail could still only see northward 285', resulting in no gain in sight distance.[5] From that spot, the "reaction, decision, acceleration, and clearance"

5. We note that Utah law requires a driver approaching a railroad crossing to stop "within fifty feet *but not less than ten feet from the nearest track* of such railroad" when an approaching train "is plainly visible and is in hazardous proximity to such crossing." Utah Code Ann. § 41-6-95(a)(4) (1982) (emphasis added).

process would still take 8.6 seconds, resulting inevitably in a collision with an unseen 50 mph train up to 636' away when the process began, as discussed above.

Gleave's crossing design expert, Mitchell, stated it was possible to stop a car beyond the stop sign and have a clear view northward 440' up the track, providing approximately 6 seconds to cross the tracks before a train farther away than that could reach the crossing. But in this position, "very close" to the track, a passing train would just miss the front end of the stopped car because the train engine is nearly 5' wider than the track.

Van Wagoner testified that a driver who stopped with the front of his car 4' from the track and then proceeded—upon seeing no oncoming train—would still take approximately 7 seconds to react, decide, and move across safely, making a collision inevitable if a 50 mph train was out of sight but fewer than 518' away when the process began.

Rio Grande's accident reconstruction expert, Limpert, testified that it was physically possible to stop a car at a safe point only 7' from the rail, but he did not testify to the length of the sight distance northward from that point. In his testimony, Limpert forcefully challenged the validity of the assumptions and factors used in Van Wagoner's calculations, e.g., the maximum speed possible given the track's condition and the inclusion of decision and reaction time in the computations. Limpert also provided his expert opinion, illustrated by a videotape of a car being driven over the crossing from a standstill and from various distances away, that the times necessary to cross safely were roughly one-third of the estimates given by Van Wagoner. However, it was for the jury to give these conflicting opinions whatever weight it deemed appropriate. *Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983).

We decline to hold that, as a matter of law, all reasonable persons would conclude Gleave's duty at this dangerous crossing was to inch his car forward past the established stop sign to stop a second time in this narrow and precarious zone which afforded no greater degree of safety when a train approaching at 50 mph was close but still out of view. *Cf. Seybold v. Union Pac. R.R. Co.*, 121 Utah 61, 70–71, 239 P.2d 174, 179 (1951) (plaintiff either failed to look, looked but failed to see what was there, or looked and failed to see the oncoming train because blinded by lights but proceeded anyway); *Drummond v. Union Pac. R.R. Co.*, 111 Utah 289, 177 P.2d 903, 906 (1947) (plaintiff would have had clear view of 25–30 mph train if she had stopped in a place "which afforded her both safety and an opportunity to look").

There is substantial evidence on which a jury could reasonably base a finding that Gleave exercised reasonable care under the circumstances and yet failed to see the oncoming train until it was too late to avoid the collision. Accordingly, we affirm the trial court's denial of Rio Grande's motion for a new trial.

III. SOVEREIGN IMMUNITY

Gleave alleged in his complaint that UDOT breached its statutory duty under Utah Code Ann. §§ 54–4–14 through 15.1 (1986) to install, maintain and improve safety signals and devices at the 1600 South railroad crossing in Springville. Although there was a yellow warning sign, a crossbuck, and a stop sign at this crossing, he claimed that UDOT knew or should have known of the unreasonably dangerous condition there and that it negligently failed to install "adequate" safety signals or devices.

The trial court granted UDOT's motion to dismiss the complaint based on sovereign immunity. In so ruling, the court stated that "the decision of whether or not to install a safety signal at a particular crossing is a discretionary one protected by the Governmental Immunity Act," impliedly holding that the allegedly negligent actions of UDOT constituted a governmental function protected by the grant of immunity in Utah Code Ann. § 63–30–3 (1986).

On appeal, Rio Grande makes two arguments challenging this ruling: (1) UDOT's regulation of traffic warning devices at

railroad crossings is not a "governmental function" within the purview of section 63-30-3 and, therefore, UDOT is not immune from suit, and (2) the trial court erroneously concluded that UDOT's failure to install different safety devices at the subject crossing fell within the "discretionary function" exception to the waiver of immunity in Utah Code Ann § 63-30-10(1) (1986) [6]

A GOVERNMENTAL FUNCTION

[4] The Utah Governmental Immunity Act ("Act") states that, '[e]xcept as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function " Utah Code Ann § 63-30-3 (1986) In *Standiford v Salt Lake City Corp*, 605 P 2d 1230 (Utah 1980), the Utah Supreme Court abandoned the "governmental versus proprietary function" analysis previously used in deciding whether an entity was immune from suit for injuries resulting from a particular activity In doing so, the court recognized that the Act does not expressly or impliedly set up such a dichotomy and that the results of the application of this analysis had been inconsistent and unpredictable *See id* at 1232-35 The court articulated a new test and redefined a governmental function as an activity "of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity" *Id* at 1237 Under the new test, the *Standiford* court concluded the operation of a public golf course is not a governmental function *Id*

The next year, in *Johnson v Salt Lake City Corp*, 629 P 2d 432, 434 (Utah 1981), the court explained "The first part of the *Standiford* test—activity of such a unique nature that it can only be performed by a governmental agency—does not refer to what government *may* do, but to what government alone *must* do"

The Utah Supreme Court has applied the *Standiford* test numerous times, concluding that the maintenance of traffic control devices,[7] supervision of financial institutions,[8] the issuance of motor vehicle titles and ownership recordkeeping responsibilities,[9] and supervision of subdivision development and canal fence construction [10] are governmental functions within the meaning of the Act Supervision of disbursement of escrowed funds,[11] the provision of winter recreational areas on a public golf course,[12] and the operation of a sewage system [13] have been held not to be governmental functions

UDOT is statutorily empowered to "provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings," Utah Code Ann § 54-4-15 1 (1986), and to apportion costs of such projects among public and private entities Utah Code Ann § 54-4-15 3 (1986) The government alone must consistently regulate safety devices at railroad crossings, determine which devices at which crossings should be recommended

6. In his cross appeal, Gleave did not challenge the trial court's dismissal of UDOT Rio Grande, in both its opposition to UDOT's pretrial motion to dismiss and in its appeal to this court, has not contended that Gleave's injury was caused by UDOT's creation of a dangerous condition on a road, for which immunity is expressly waived in Utah Code Ann § 63-30-8 (1986) This separate waiver provision is not subject to the discretionary function" exception in section 63-30-10(1) *Sanford v University of Utah*, 26 Utah 2d 285 488 P 2d 741, 745 (1971) *See Richards v Leavitt*, 716 P 2d 276, 278 (Utah 1985) (per curiam), *Bigelow v Ingersoll*, 618 P 2d 50, 54 n 3 (Utah 1980)

7. *Richards v Leavitt* 716 P 2d 276 (Utah 1985) (per curiam)

8. *Madsen v Borthick*, 658 P 2d 627 (Utah 1983)

9 *Metropolitan Fin Co v State*, 714 P 2d 293 (Utah 1986) (per curiam)

10. *Loveland v Orem City Corp*, 746 P 2d 763 (1987)

11. *Cox v Utah Mortg & Loan Co*, 716 P 2d 783 (Utah 1986)

12. *Johnson v Salt Lake City Corp*, 629 P 2d 432 (Utah 1981)

13 *Dalton v Salt Lake Sub San Dist*, 676 P 2d 399 (Utah 1984) *Thomas v Clearfield City* 642 P 2d 737 (Utah 1982)

for federal funding, rank crossings in order of need for upgrading in light of limited funds for that purpose, and apportion signal installation costs between public and private entities. As a practical matter, the private sector cannot perform these functions. Accordingly, we hold that the regulation of public safety needs and the evaluation, installation, maintenance and improvement of safety signals or devices at railroad crossings is a governmental function immunized from suit under section 63–30–3 of the Act.

B. DISCRETIONARY FUNCTION EXCEPTION

[5] In light of this holding, we must next determine whether UDOT's allegedly negligent failure to install different safety signals at the 1600 South crossing in Springville is a "discretionary function" within the meaning of Utah Code Ann. § 63–30–10(1)(a), an exception to the waiver of immunity in that statutory section:

> (1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:
>
> (a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused[.]

The Utah Supreme Court has stated that this "discretionary function" exception was "intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable ways from individual and class legal actions, the continual threat of which would make public administration all but impossible." *Frank v. State*, 613 P.2d 517, 520 (Utah 1980). The *Frank* court noted its prior observation, in *Carroll v. State Road Comm'n*, 27 Utah 2d 384, 388, 496 P.2d 888, 891 (1972), that virtually all acts require the exercise of some degree of discretion and that the statutory exception should thus be confined to those decisions and acts occurring at the "basic policy-making level," and not extended to those acts and decisions taking place at the operational level, or, in other words, "... those which concern routine, everyday matters, not requiring evaluation of broad policy factors."

Frank, 613 P.2d at 520.

More recently, in *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49 (Utah 1983), the court adopted the following test for distinguishing between functions at the policy-making level from those at the operational level, requiring affirmative answers to four preliminary questions in order for an act to be purely discretionary:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 51.

With regard to the case before us, the first question presented by *Little* must be answered affirmatively. The basic governmental objective involved in "installing, maintaining, reconstructing, and improving" safety devices is the consistent promotion of public safety, a basic government objective. Evaluating all of the approximately 1,280 railroad crossings in the state and assigning priorities for safety signal upgrades is essential to the realization of the protection of public safety, especially in light of the fact that there are not unlimited funds available to upgrade all needy crossings at once. Thus, the second question of the *Little* test must also be answered affirmatively.

UDOT exercises "basic policy evaluation, judgment, and expertise" when evaluating railroad crossings for safety signal improvements and when deciding which crossings should have upgraded safety appliances first. In applying UDOT's safety policy, UDOT's surveillance team performs on-site inspections and weighs the numerous factors relating to crossing safety. The team consists of transportation experts who exercise their collective judgment and expertise in making their evaluations of the relative dangerousness of railroad crossings in Utah, taking into consideration their physical characteristics and configurations, the volume and type of vehicular and train traffic, and other relevant factors. Thus, the third *Little* question must be answered affirmatively.

Finally, Utah Code Ann. § 54-4-14 *et seq.* (1986) empowers UDOT with the authority to supervise and regulate the safety of all the State's railroad crossings, including the authority to provide for the installing, maintaining, reconstructing, and improving of safety devices and signals there. Utah Code Ann. § 54-4-15.1 (1986). UDOT clearly has the legal authority to use the monies available for safety signal improvement at the most dangerous crossings first, which means that other less dangerous crossings, such as this one, must await their turn for improvement. Thus, the answer to the fourth *Little* question is affirmative.

We therefore hold that UDOT's failure to install different safety signals or devices at the subject crossing was a purely discretionary function within the meaning of section 63-30-10(1)(a).

Prior Utah case law supports this conclusion. In *Velasquez v. Union Pac. R.R. Co.*, 24 Utah 2d 217, 469 P.2d 5 (1970), the Utah Supreme Court held that the Utah Public Service Commission's alleged failure to require better warning devices at a railroad crossing involved the exercise of a discretionary function for which immunity was not waived. The *Velasquez* plaintiff, a passenger in a pickup truck hit by a train, claimed that the state agency was liable for failing to require additional safety devices at the crossing. Affirming summary judgment in the agency's favor, the court concluded that the statutory directive to the PSC to prescribe the installation of "appropriate" safety or other devices by the railroad company (under a prior version of section 54-4-14) indicated a legislative intent to confer discretion on the responsible agency at the time, i.e., the Public Service Commission:

> The statute gives the respondent [PSC] the power to require a different safety device at the crossing in question, but that does not mean that the plaintiff should recover simply because a better warning signal could or should have been installed. The Public Service Commission has the discretion to require the installation of such signals as in its judgment the health or safety of employees, passengers, customers or the public may require.

Id. at 218, 469 P.2d at 6.

We find no merit in Rio Grande's argument that *Velasquez* has been overruled by *Standiford* and *Bigelow v. Ingersoll*, 618 P.2d 50 (Utah 1980). As previously noted, *Standiford* overruled only those cases applying the "governmental versus proprietary function" analysis in deciding whether or not section 63-30-3 immunity applied to the allegedly injurious activity in the first place. In *Velasquez*, the court did not apply the later discredited mode of analysis; instead, it merely assumed there was a governmental function and focused solely on the applicability of the discretionary function exception. Similarly, in *Bigelow*, the court applied the "basic policy-making level versus operational level" distinction set forth in *Frank*, discussed above, and concluded that the design of the street traffic control system did not involve decisions and acts at the basic policy-making level and, therefore, was not a discretionary function within section 63-30-10(1). *Bigelow*, 618 P.2d at 53.

However, as stated above, the allegedly negligent omission in this case does involve decisions and acts at the basic policy-making level. The trial court thus correctly concluded that UDOT's failure to install

different safety devices or signals at the 1600 South crossing in Springville comes within the discretionary function exception of section 63-30-10(1)(a). We therefore affirm the dismissal of the complaint against UDOT.

IV. PUNITIVE DAMAGE CLAIM

Gleave alleged that Rio Grande had knowledge of dangerous conditions at the crossing and "willfully or recklessly failed to take any corrective steps." At the close of Gleave's evidence, Rio Grande moved for a directed verdict on Gleave's punitive damage claim because of insufficiency of the evidence. Rio Grande argued that there was not one scintilla of evidence of willful or malicious activity on its part. Gleave agreed there was no proof of actual malice, but argued there was sufficient evidence of reckless conduct for the jury to imply malice.

The trial court granted Rio Grande's motion and withdrew the punitive damage issue from the jury's consideration; however, it is not clear whether that ruling was based on inadequate evidence of actual malice or implied malice.

[6] In reviewing the correctness of the trial court's grant of a directed verdict to Rio Grande on Gleave's punitive damage claim, we must view the evidence in the light most favorable to him, the party against whom the motion was made. *Kim v. Anderson*, 610 P.2d 1270, 1271 (Utah 1980). If there is no evidence to justify punitive damages, the issue was properly withheld from the jury. *Tripp v. Bagley*, 75 Utah 42, 282 P. 1026 (1929). If, however, reasonable inferences supporting judgment for the losing party could be drawn from the evidence presented at trial, the directed verdict cannot be sustained. *Little America Refining Co. v. Leyba*, 641 P.2d 112, 114 (Utah 1982); *Kim*, 610 P.2d at 1271. This is so even if reasonable persons might reach different conclusions on the punitive damage issue after considering the evidence and the reasonable inferences therefrom. *See Little America Refining Co.*, 641 P.2d at 114.

[7] Before punitive damages may be awarded, the plaintiff must prove conduct that is willful and malicious or that manifests a knowing and reckless indifference toward, and disregard of, the rights of others. *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 337 (Utah 1985); *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1112-13 (Utah 1985); *Biswell v. Duncan*, 742 P.2d 80, 84 (Utah App.1987).

[8] In our review of Rio Grande's duty of care, we noted substantial evidence from which a jury could reasonably conclude that Rio Grande was negligent. But evidence of simple negligence alone does not support an award of punitive damages.

> Punitive damages should be awarded infrequently. Simple negligence will never suffice as a basis upon which such damages may be awarded. "[They] are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence."

Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186 (Utah 1983) (quoting Restatement (Second) of Torts § 908 comment b (1979)).[14]

In *Behrens*, the Utah Supreme Court identified three elements of the type of conduct that will support an award of punitive damages against a defendant in a negligence action who acts "maliciously or in reckless disregard for the rights of others." Although actual intent to cause injury is not necessary,

> the defendant must either know or should know "that such conduct would, [1] in a high degree of probability, result

14. We note that the Restatement (Second) of Torts § 908 (1979) states:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others....

> in substantial harm to another," *Danculovich v. Brown*, Wyo., *593 P.2d 187, 193* (1979), and [2] the conduct must be "highly unreasonable conduct, or an extreme departure from ordinary care, [3] in a situation where a high degree of danger is apparent." *Id.* at 191.

Behrens, 675 P.2d at 1186–87 (numbering added).

We now evaluate the evidence presented by Gleave in light of these three elements:

(1) High degree of probability. There was uncontroverted testimony that there had been no accidents at this crossing up to the time of UDOT's inspection and evaluation in 1974. After that time, Rio Grande installed stop signs as a temporary measure until UDOT upgraded the crossing with flashing red lights. Gleave's attorney claimed he would offer evidence at trial of "near misses" at the crossing, but none was produced. The locality was rural, and the road not heavily travelled. There is no evidence that Rio Grande knew or should have known of the facts discovered by Gleave's experts after this accident. In any event, the evidence shows a low degree of probability.

(2) Highly unreasonable conduct or extreme departure from ordinary care. At worst, the evidence shows errors of judgment, i.e., ordinary negligence on the part of Rio Grande, in failing to take steps to reduce the risks at this crossing. There is no evidence of an extreme departure from ordinary care.

(3) High degree of danger apparent. A degree of danger exists at every railroad crossing. The evidence showed the degree of danger at this crossing was high. The crossing was more than ordinarily hazardous. But, was the extent of that danger readily apparent prior to this accident? Perhaps reasonable minds could differ concerning this prong of the *Behrens* test, but the first two prongs remain unsatisfied.

[9, 10] Moreover, the general rule is that only compensatory damages are appropriate and that punitive damages may be awarded *only in exceptional cases*. *Behrens*, 675 P.2d at 1186. The evidence shows nothing exceptional about Rio Grande's conduct in this case.

> Furthermore, punitive damages should be awarded only when they will clearly accomplish a public objective not accomplished by the award of compensatory damages.... The intended deterrent effect must be clear and in proportion to the nature of the wrong and the possibility of recurrence.

Id. at 1187. Gleave has not directed our attention to any public objective which would clearly be accomplished by an award of punitive damages herein. Where the wrong is the result of simple negligence, there is nothing to deter. We believe the substantial compensatory award will provide ample motivation for Rio Grande to take appropriate measures to protect the public and itself from a recurrence of this unfortunate accident.

There is no evidence of malice, actual or implied, that would justify an award of punitive damages against Rio Grande. The trial court thus properly withheld that issue from the jury.

V. PREJUDGMENT INTEREST

In the special verdict returned in this case, the jury awarded Gleave the following itemized damages:

A.	Past medical expenses	$56,000
B.	Future medical expenses	$22,540
C.	Past lost wages	$20,000
D.	Loss of future earnings and earning capacity	$275,000
E.	General Damages	$50,000
F.	Market value of Gleave vehicle	$1,600
	Total	$425,140

The trial court granted Gleave's post-trial motion to amend his complaint to include a claim for prejudgment interest on items A, C, and D, under Utah Code Ann. § 78–27–44 (1987). Gleave's request for prejudgment interest on items A and C was granted, but the court denied prejudgment interest on item D.

It is true, as Gleave asserts, that lost future earning capacity is a special damage insofar as pleading requirements are concerned. *Cohn v. J.C. Penney Co.*, 537 P.2d 306, 308 (Utah 1975). But we must still decide whether section 78–27–44 authorizes prejudgment interest on all types of special

damages, whether they arise before or after entry of a plaintiff's personal injury judgment.

[11–13] In construing this legislation, we must give effect to the legislature's underlying intent, *American Coal Co. v. Sandstrom*, 689 P.2d 1, 3 (Utah 1984), and assume that each term in the statute was used advisedly. *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982). We will interpret and apply the statute according to its literal wording unless it is unreasonably confused or inoperable. *Id.; Horne v. Horne*, 737 P.2d 244, 247 (Utah App.1987). A proper construction of its terms must further the statute's purposes. *RDG Assocs./Jorman Corp. v. Industrial Comm'n*, 741 P.2d 948, 951 (Utah 1987).

[14] The statute provides:

> In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association or partnership, whether by negligence or willful intent of that other person, corporation, association or partnership, and whether that injury shall have resulted fatally or otherwise, it shall be lawful for the plaintiff in the complaint to claim interest on the special damages *alleged from the date of the occurrence of the act giving rise to the cause of action* and it shall be the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of damages assessed by the verdict of the jury ... interest on that amount calculated at 8% per annum from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment.

Utah Code Ann. § 78–27–44 (1987) (emphasis added). We agree with Rio Grande that this emphasized phrase clearly modifies "special damages," limiting those special damages on which prejudgment interest is recoverable to those that arise in the period between the act giving rise to the cause of action and entry of judgment in plaintiff's favor.

This interpretation of the statute furthers its purpose, as documented in its legislative history. When first introduced at the 1975 Legislature by Senator Renstrom as Senate Bill 153 and later passed by the Senate, the word "special" was not in the proposed statute; prejudgment interest was to be awarded a successful plaintiff on all "damages alleged from the date of the occurrence of the act...." *Utah Senate Tr. of 3rd Reading of S.B. 153*, February 20, 1975.

At the bill's second and third reading in the House of Representatives, however, there was a lengthy discussion of the problems with such a broad prejudgment interest provision. *Utah House of Reps. Tr. of 2nd and 3rd Reading of S.B. 153*, March 13, 1975. Some legislators voiced their concerns about accrual of interest on damages in a malpractice action where the cause of action did not even accrue until discovery of the injury, possibly many years after the date the injurious act occurred. A similar concern was voiced regarding injured minors who waited until after reaching majority age before bringing their lawsuits; under the proposed statute, interest could accrue for many years. Others feared the effect such a law would have on doctors' malpractice insurance rates and on all casualty insurance premiums in the state.

Toward the end of the House debate, Representative Fisher offered an amendment to add the word "special" before the word "damages" in the bill, explaining that special damages are the expenses paid for those who are injured so they can immediately receive necessary medical and hospital care. He added that special damages are

> those expenses that they have paid out of pocket, for which they have used their own money and which they will not get until the settlement of their action. Getting interest *on their out-of-pocket expenses will provide a total recoupment of any expenses that they have had from the time of the accident until they are paid in full by a recovery at court* or by settlement. I believe it's a reasonable and a very logical amendment that

> interest on special damages be endorsed by us, and in that form we will pass the intent of the bill of paying for *all expenses until such time as judgment is rendered*, and we will not be assessing an interest on something that neither of the parties know.

Id. (emphasis added). In its amended form, Senate Bill 153 then passed in the House by five votes. When the amended bill was returned to the Senate later the same day, Senator Renstrom made a motion that the Senate concur in the House amendment. After that motion passed, the amended bill passed the Senate with no further discussion. *Utah Senate Tr. of Vote on S.B. 153*, March 13, 1975.

The legislative history and the statutory language reveal the legislature's intent to distinguish between special damages accruing between the date of the injurious act and the entry of judgment (such as medical expenses or lost wages) and those (such as lost future earnings and future earning capacity) that will arise subsequent to entry of judgment, and to authorize prejudgment interest only on the former category of special damages.[15] The trial court thus properly denied Gleave prejudgment interest under section 78–27–44 on that portion of damages in the special jury verdict designated as "lost future earnings and earning capacity."

CONCLUSION

We have considered the other issues raised by Rio Grande and find them meritless. The judgment of the trial court is affirmed. Costs are awarded only to UDOT.

GARFF and BENCH, JJ., concur.

15. The latter type is, of course, subject to the statutory interest rate on judgments in Utah Code Ann. § 15–1–4 (1986).

Exhibit B

ROBERT J. DEBRY
ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff
965 East 4800 South, Suite 2
Salt Lake City, Utah, 84117
Telephone: (801) 262-8915

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff, vs. DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Utah corporation, UTAH RAILWAY COMPANY, a Utah corporation, GERALD H. BURTON, an individual, CITY OF SPRINGVILLE, a Municipal corporation, and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	ORDER GRANTING DIRECTED VERDICT REGARDING PUNITIVE DAMAGES Civil No. 62912 (Judge Cullen Y. Christensen)

At the close of plaintiff's case (June 18, 1984), defendant moved for an order granting a directed verdict with respect to the issue of punitive damages.

For reasons set forth in the record, the directed verdict is granted with respect to punitive damages only.

The issue of compensatory damages is specifically reserved for the jury.

DATED this 15th day of August, 1984.

BY THE COURT:

Cullen Y. Christensen

Exhibit C

STATE OF UTAH
INVESTIGATING OFFICER'S REPORT OF TRAFFIC ACCIDENT

DO NOT WRITE IN THIS SPACE

OF DENT 04/16/82 (Mon / Day / Year) — DAY OF WEEK: 1 2 3 4 5 6 7 / M T W Th F S S — MILITARY TIME 0612C

E WHERE DENT OCCURRED County UTAH 49 City or town SPRINGVILLE

and was outside city limits — distance from city limits or nearest town ____ miles ☐N ☐S ☐E ☐W of ____ City or town

ON WHICH DENT OCCURRED 1600 SOUTH — Give name of street or highway number

ITS INTERSECTION WITH ____ Name of intersecting street or highway number

NOT AT INTERSECTION 500 feet ☐N ☐S ☐E ☐W of MAIN STREET — Nearest intersection street house no., landmark

☐N ☐S ☐E ☐W of milepost ____ — BE SURE TO COMPLETE IF ROAD HAS MILEPOSTS

nan of a mile

STATE/LOCAL

☐ Traffic Accident ☐ Non Traffic Accident

CIDENT SEVERITY: 1 Damage only; 2 Possible injury; 3 Non-incapacitating; 4 Incapacitating; 5 Fatal

FIRST HARMFUL EVENT: 3

SUBSEQUENT EVENT: ____

1 Pedestrian; 2 Other motor vehicle; 3 Train; 4 Bicycle; 5 Animal; 6 Fixed object; 7 Other object; 8 Overturned on road; 9 Ran off road; 10 Other non-collision

If accident involved more than 2 motor vehicles, pedestrian, bicycle, animal, fixed object attach supplement [Form SR-9A]

2 TOTAL NUMBER VEHICLES INVOLVED

	Make	Model	Body Style/Type	Code	Commercial Vehicle (Reg 12,000 lbs or more)	Description of cargo	Reg weight of vehicle
175	CHEV	MONZA	2DR	C12	Interstate ☐ Intrastate ☐		

Sticker #	LICENSE PLATE INFO	Year	Month	State	Number	Parts damaged	Removal Authority
		82	04	UT	Y96407 (REG)	01 1	3

Removal Authority: 1 - Owner; 2 - Driver; 3 - Officer; 4 - Occupant; 5 - Other; 6 - N/A

ation Number	VALID SAFETY INSPECTION	Disposition of Vehicle	Cost of Repair
2122353	1 (1 - Yes, 2 - No)	MERCRY'S GARAGE, SPRINGVILLE UT	$ TOTAL

Full name	Street City State	Years Drive Exp	Driver Education
ROBERT L GLEAVE	Box 712 SALEM UT 84653	1	
Full name	Street, City State		
ROBERT L GLEAVE	BOX 712 SALEM UT 84653		

Driver Education: 1 - Public; 2 - Com.; 3 - None; 4 - Unkn.

	Number	Type	Specify Restrictions	Date of Birth (Month Day Year)	Age	Sex	Safe Equip	Injury Type	Injury Cause	Injury Area	Ejection	Through what area ejected?
UT	4089640	1 (1 - Regular, 2 - Chauffeur, 3 - Motorcycle, 4 - Restricted)		01 05 43	39	M	3	4	9	8	3	DRIVER'S WINDOW
Name												
Address												
Name												
Address												
Name												
Address												
Name												
Address												
Name												
Address												

	Make	Model	Body Style/Type	Code	Commercial Vehicle (Reg. 12,000 lbs or more)	Description of cargo	Reg weight of veh
	DIESEL	ENGINE		21E	Interstate ☐ Intrastate ☐		

Sticker #	LICENSE PLATE INFO	Year	Month	State	Number	Parts damaged	Removal Authority
							3

Removal Authority: 1 - Owner; 2 - Driver; 3 - Officer; 4 - Occupant; 5 - Other; 6 - N/A

tion Number	VALID SAFETY INSPECTION	Disposition of Vehicle	Cost of Repair
78	1 (1 - Yes, 2 - No)		$ 200.00

Full name	Street, City, State	Years Drive Exp	Driver Education
DAUGHTERS OF BRIGHAM YOUNG WESTERN FIELD		1	
Full name	Street, City, State		
GERALD H BURTON (TRAIN ENGINEER)	7253 SO 580 EAST MIDVALE UT		

Driver Education: 1 - Public; 2 - Com.; 3 - None; 4 - Unkn.

	Number	Type	Specify Restrictions	Date of Birth (Month Day Year)	Age	Sex	Safe Equip	Injury Type	Injury Cause	Injury Area	Ejection	Through what area ejected?
CONDUCTOR)		1 (1 - Regular, 2 - Chauffeur, 3 - Motorcycle, 4 - Restricted)										
C.E. CONNORS				RN-1355								
Address	527 JEREMY ST. S.L.C.											
Name												
Address												
Address												

DEFENDANT'S EXHIBIT

TYPE OF LOCALITY
1 - Manufacturing or industrial
2 - Shopping or business
3 - Residential
4 - School
5 - Farms and Fields
6 - Open Country

ROAD SURFACE
1 - Dry
2 - Wet
3 - Muddy slippery
4 - Snowy slippery
5 - Icy

LIGHT CONDITION
1 - Daylight
2 - Dawn or dusk
3 - Dark-no street lights
4 - Dark-Street lights

WEATHER
1 - Clear or cloudy
2 - Raining
3 - Snowing
4 - Fog
5 - Dust

TRAFFIC CONTROL
1 - Officer or watchman
2 - Flagman
3 - Traffic signal
4 - Traffic signal flashing
5 - Stop sign
6 - Yield sign
7 - RR gates or signal
8 - Specify other
9 - No control present

ROAD CHARACTER
1 - Straight-level
2 - Straight-grade
3 - Straight-Hillcrest
4 - Curve-level
5 - Curve-grade
6 - Curve-hillcrest

ALCOHOL TEST
Veh 1: 1 | Veh 2: 1 | Ped:
1 - No Test
2 - Blood
3 - Breath
4 - Other
5 - Unknown
6 - Refused
7 - Post Mortem

ALCOHOL TEST RESULTS
Veh 1 - Veh 2 - Ped

CONTRIBUTING CIRCUMSTANCES

Prime Contributor
DRIVER 1: 0 5
DRIVER 2: 1 0

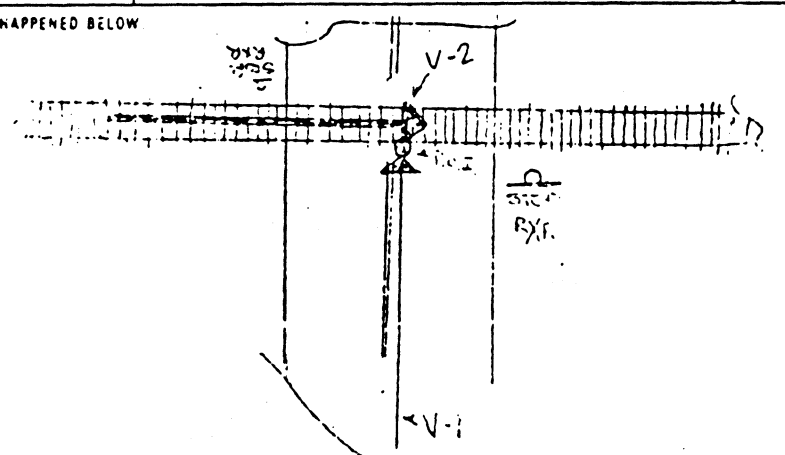
	Driver 1	Driver 2
00 Did not contribute	☐	☐
01 Speed too fast	☐	☐
02 Failed to yield right of way	☐	☐
03 Drove left of center	☐	☐
04 Improper overtaking	☐	☐
05 Passed stop sign	☐	☐
06 Disregarded traffic signal	☐	☐
07 Followed too closely	☐	☐
08 Made improper turn	☐	☐
28 DUI (alcohol)	☐	☐
09 Had been drinking	☐	☐
10 Under the influence of drugs	☐	☐
11 Eyesight defective-uncorrected	☐	☐
12 Asleep	☐	☐
13 Fatigued	☐	☐
14 Ill	☐	☐
15 Improper parking	☐	☐
16 Improper lookout	☐	☐
17 Failed to signal	☐	☐
18 Other improper driving	☐	☐
19 Brakes defective	☐	☐
20 Headlights insufficient or out	☐	☐
21 Headlights glaring	☐	☐
22 Other lights or reflectors defective	☐	☐
23 Steering mechanism defective	☐	☐
24 Tires defective	☐	☐
25 Windshield obscured	☐	☐
26 Other defective condition of vehicle	☐	☐
27 Hit and Run	☐	☐
30 Non-collision (Rollover)	☐	☐
31 Collision (Fire)	☐	☐
40 Stolen	☐	☐

DIRECTIONAL ANALYSIS
Veh 1: 5
Veh 2: 5
DIRECTION PRIOR TO TURNING
1 - N
2 - S
3 - E
4 - W
5 - N/A

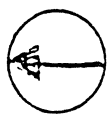
COLLISION TYPE
1 1
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 - OTHER 17 - SINGLE VEH 18 - BACKING

Driver Action Prior to Accident
Driver: 0 1
01 Go straight ahead
02 Overtake
03 Make right turn
04 Make left turn
05 Make U turn
06 Slow or stop
07 Start in traffic lane
08 Start from curb position
09 Back
10 Remain stopped in traffic lane
11 Remain parked

DIAGRAM WHAT HAPPENED BELOW



INDICATE DIRECTION OF NORTH



	Vehicle 1	2
Travel Speeds	0 5	1 1
Impact Speeds	0 2	1
Posted Speeds	0 0	5 1

DESCRIBE WHAT HAPPENED (Refer to Vehicles by Number) V-1 WAS E/B ON 1600 South. V-2 (A DIESEL FREIGHT TRAIN) WAS S/B ON TRACKS APPROX 500 FT EAST OF SOUTH MAIN ST. V-1 STOPPED FOR STOP SIGN THEN PROCEEDED ACROSS V-2 (V-2 APPEARS SLOW SPEED) UNTIL COLLISION UNAVOIDABLE. V-1 STOPPED ATTEMPTED TO PASS OUT OF V-2's PATH, UNSUCCESSFULLY. D-1 CAUSED COLLISION BY FAILURE TO STOP FOR POSTED SIGN & IMPROPER LOOKOUT.

WITNESSES
Name _____ Address _____
Name _____ Address _____

FIRST AID ADMINISTERED BY
1 - Policeman
2 - Fireman
3 - Ambulance Personnel
4 - Paramedics
5 - Doctor
6 - Private Individual
7 - Hospital
8 - Helicopter Personnel
9 - None Administered
0 - Unknown

EMS REPORT NO. 2 4 9 7 2 4
EMS REPORT NO.

INJURED TAKEN BY: 2
1 - Ambulance, Private
2 - Ambulance, Police
3 - Paramedics
4 - Private Vehicle
5 - Other

INJURED TAKEN TO: MTN. VIEW HOSPITAL, PAYSON

POLICE ACTIVITY
Date Notified of Accident: 0 4 / 1 6 / 8 2 (Month / Day / Year)
Time Notified of Accident (USE MILITARY TIME): 0 6 3 1
Arrived at Scene: 0 6 3 9
Source of Information (Officer at scene, No. 1 Driver contacted station, etc.): OFFICER AT SCENE
Investigation of accident completed at: 0 7 5 5 of [X] the same day [ ] the _____ day following

PHOTO(S) TAKEN: 1 (1 - Yes 2 - No)

ARRESTS
Name _____ Charge _____
Name _____ Charge _____
Other action taken: _____

DIAGRAM HERE: D (DRIVER) #9 [illegible] V-2 #1 [illegible]

SPRINGVILLE CITY POLICE DEPARTMENT

NARRATIVE REPORT PAGE # 1

DATE AND TIME THIS REPORT	TYPE OF REPORT
16APR82 0630hrs.	T/C

82-379

16APR82 0630hrs. I was dipatched to a "possible train vehicle" collision, location unk. at the "south end of town" and "around 700 South." I checked the area of 700 South and 800 South Main St. and was then directed to the railroad yard on 400 West. As I checked that location, the actual location was relayed to me as 1600 South Main st.. Upon arrival I confirmed need for an ambulance with dispatch and attended to the driver (injured party). Driver was conscious and seemed rational inspite of his injuries. I obtained information as to identity of driver and then asked him what had happened. Driver, Robert Gleave, gave me the following information: Driver was E/B on 1600 South. He stated that he "slowed down" at the stop sign and looked to the south. He did not see any train. He then turned to look north. When he did he saw the train "right on top of" him. He said that he tried evasive action (stopping and backing) but was unable to avoid collision. Driver did not know how he was ejected from the vehicle. Ambulance personnel then arrived and attended to Driver.

I then contacted the conductor, C.E. Connors, who gave the following information to me: The train (owned and operated by Denver and Rio Grande Western Railroad) was on an eastbound route (south bound at the point of impact) at approx. 50 (fifty) miles per hour. As they approached the intersection of 1600 South, they observed the vehicle (V-1) pull out too far into the intersection before stopping, and into the path of their train. The train was a 33 (thirty three) car diesel which was running empty at the time.

The following measurements were taken at the scene: Width of total roadway at intersection with RR tracks--21'5" . Distance from south edge of roadway to approx. POI--7'9". Distance POI to POR--29'0". Distance veh to tracks approx.3'. Driver was located between the veh. and the tracks.

SPRINGVILLE CITY POLICE DEPARTMENT

NARRATIVE REPORT PAGE # 2

DATE AND TIME THIS REPORT	TYPE OF REPORT
16APR82 0630hrs.	T/C

82-379

Driver was transported by ambulance to Mountain View Hospital, with multiple injuries to torso, head, leg (area of left knee) and left foot.

Vehicle, a 1975 Chev Monza appeared to be totaled. all windshields and side windows appeared in tact with the exception of the drivers side window which was down (probable point of ejection.)

Unknown at time of report whether the train engineer had activated his horn as audible signal as he was approaching the intersection.

Exhibit D

C 47-PJO

Van Cott, Bagley, Cornwall & McCarthy

UTAH CODE
1987-1988

VOLUME 2

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1987 GENERAL SESSION
OF THE
FORTY-SEVENTH LEGISLATURE

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EXHIBIT D

on which the regulations or prohibitions are applicable. 1987

Article 8. Turns and Signals on Starting, Stopping or Turning

41-6-66. Turning - Manner - Traffic-control devices.

The operator of a vehicle shall make turns as follows:

(1) Right turns: both a right turn and an approach for a right turn shall be made as close as practical to the right-hand curb or edge of the roadway.

(2) Left turns: the operator of a vehicle intending to turn left shall approach the turn from the extreme left-hand lane for traffic moving in the same direction. Whenever practicable, the left turn shall be made by turning onto the roadway being entered in the extreme left-hand lane for traffic moving in the new direction, unless otherwise directed by an official traffic-control device.

(3) Two-way left turn lanes: where a special lane for making left turns by operators proceeding in opposite directions has been indicated by official traffic-control devices:

(a) a left turn may not be made from any other lane; and

(b) a vehicle may not be driven in the lane except when preparing for or making a left turn from or into the roadway or when preparing for or making a U-turn when permitted by law.

(4) The Department of Transportation and local authorities in their respective jurisdictions may cause official traffic-control devices to be placed and require and direct that a different course from that specified in this section be traveled by turning vehicles. The operator of a vehicle may not turn a vehicle other than as directed by those devices. 1987

41-6-67. Turning around - Where prohibited - Visibility.

(1) The operator of any vehicle may not turn the vehicle to proceed in the opposite direction unless the movement can be made safely and without interfering with other traffic.

(2) A vehicle may not be turned to proceed in the opposite direction on any curve, or upon the approach to, or near the crest of a grade, if the vehicle is not visible at a distance of 500 feet by the operator of any other vehicle approaching from either direction. 1987

41-6-68. Moving a vehicle - Safety.

A person may not move a vehicle which is stopped, standing, or parked until the movement may be made with reasonable safety. 1987

41-6-69. Turning or changing lanes - Safety - Signals - Stopping or sudden decrease in speed - Signal flashing - Where prohibited.

(1)(a) A person may not turn a vehicle or move right or left upon a roadway or change lanes until the movement can be made with reasonable safety and an appropriate signal has been given.

(b) A signal of intention to turn right or left or to change lanes shall be given continuously for at least the last three seconds preceding the beginning of the turn or change.

(2) A person may not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the operator of any vehicle immediately to the rear when there is opportunity to give a signal.

(3) The signals required on vehicles by Section 41-6-70 may not be flashed on one side only on a disabled vehicle, flashed as a courtesy or "do pass" to operators of other vehicles approaching from the rear, or flashed on one side only of a parked vehicle except as necessary to comply with this section. 1987

41-6-70. Signals - Methods.

A stop or turn signal when required shall be given either by the hand and arm or by signal lamps. 1987

41-6-71. Signals - How made.

Signals required to be given by hand and arm shall be given from the left side of the vehicle as follows:

(1) Left turn: hand and arm extended horizontally;

(2) Right turn: hand and arm extended upward; and

(3) Stop or decrease speed: hand and arm extended downward. 1987

Article 9. Right-of-way

41-6-72. Unregulated intersection - Right-of-way between vehicles.

(1) Except as specified in Subsection (2), when more than one vehicle enters or approaches an unregulated or an all-way stop intersection from different highways at approximately the same time, the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right unless otherwise directed by a peace officer.

(2) When approaching an unregulated intersection the operator of a vehicle on a highway that does not continue beyond the intersection shall yield the right-of-way to the operator of any vehicle on the intersecting highway. 1987

41-6-72.10. Right-of-way - Stop or yield signals - Yield - Collisions at intersections or junctions of roadways - Evidence.

(1) Preferential right-of-way may be indicated by stop signs or yield signs under Section 41-6-99.

(2) Except when directed to proceed by a peace officer, every operator of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, but if none, then at a point nearest the intersecting roadway where the operator has a view of approaching traffic on the

intersecting roadway before entering it After having stopped, the operator shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when the operator is moving across or within the intersection or junction of roadways. The operator shall yield the right-of-way to pedestrians within an adjacent crosswalk.

(3)(a) The operator of a vehicle approaching a yield sign shall slow down to a speed reasonable for the existing conditions and if required for safety, shall stop as provided under Subsection (2)

(b) After slowing or stopping, the operator shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the operator is moving across or within the intersection or junction of roadways The operator shall yield to pedestrians within an adjacent crosswalk. If the operator is involved in a collision with a vehicle in the intersection or junction of roadways or with a pedestrian at an adjacent crosswalk, after passing a yield sign without stopping, the collision is prima facie evidence of the operator's failure to yield the right-of-way, but is not considered negligence per se in determining liability for the accident. 1987

41-6-73. Vehicle turning left - Yield right-of-way.

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard 1987

41-6-74. Repealed. 1987

41-6-74.10. Repealed. 1987

41-6-75. Entering or crossing highway other than from another roadway - Yield right-of-way.

The operator of a vehicle about to enter or cross a highway from any place other than another highway shall yield the right-of-way to all vehicles approaching on the highway to be entered or crossed 1987

41-6-75.5. Merging lanes - Yielding.

The operator of a vehicle traveling in a lane that is about to merge into another lane shall yield the right-of-way to all vehicles traveling in the lane or lanes into which the lane of the operator is merging and which are so close as to be an immediate hazard This section does not apply to entry lanes to limited access highways 1987

41-6-76. Emergency vehicle - Necessary signals - Duties of respective drivers.

(1) Upon the immediate approach of an authorized emergency vehicle using audible or visual signals under Sections 41-6-14, 41-6-132, or 41-6-146 or of a peace officer vehicle lawfully using an audible or visual signal, the operator of every other vehicle shall yield the right-of-way and immediately move to a position parallel to, and as close as possible to, the right hand edge or curb of the highway, clear of any intersection and shall stop and remain there until the authorized emergency vehicle has passed, except when otherwise directed by a peace officer

(2) This section does not relieve the operator of an authorized emergency vehicle from the duty to drive with regard for the safety of all persons using the highway 1987

41-6-76.10. Vehicle or pedestrian working upon highway - Right-of-way.

The operator of a vehicle shall yield the right-of-way to any'

(1) authorized vehicle or pedestrian actually engaged in work upon a highway within any highway construction or maintenance area indicated by official traffic-control devices, or

(2) authorized vehicle obviously and actually engaged in work upon a highway when the vehicle displays lights meeting the requirements of Section 41-6-140 20 1987

Article 10. Pedestrians' Rights and Duties

41-6-77. Pedestrians subject to traffic-control devices - Other controls.

(1) A pedestrian shall obey the instructions of any official traffic-control device specifically applicable to him unless otherwise directed by a peace officer

(2) Pedestrians are subject to traffic and pedestrian-control signals under Sections 41-6-24 and 41-6-25 1987

41-6-78. Pedestrians' right-of-way - Duty of pedestrian.

(1)(a) When traffic-control signals are not in place or not in operation, the operator of a vehicle shall yield the right-of-way, slowing down or stopping if necessary to yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger This subsection does not apply under conditions of Subsection 41-6-79(2).

(b) A pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard

(2) When a vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear may not overtake and pass the stopped vehicle 1987

41-6-79. Pedestrians yielding right-of-way - Limits on pedestrians.

(1) A pedestrian crossing a roadway at any point

stop, as far out of the way of traffic as practical. After stopping he shall yield to any traffic proceeding in either direction along the roadway he had been using. After yielding and complying with any official traffic-control device or peace officer regulating traffic, he may proceed in the new direction.

(3) Notwithstanding Subsections (1) and (2), the Department of Transportation and local authorities in their respective jurisdictions may cause official traffic-control devices to be placed and require and direct that a specific course be traveled by turning bicycles and mopeds. When the devices are placed, a person may not turn a bicycle other than as directed by the devices. 1987

41-6-87.7. Bicycles and mopeds - Turn signals.

(1) Except as provided in this section, a person riding a bicycle or moped shall comply with Section 41-6-69.

(2) A signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the bicycle or moped before turning, and shall be given while the bicycle or moped is stopped waiting to turn. A signal by hand and arm need not be given continuously if the hand is needed in the control or operation of the bicycle or moped. 1987

41-6-87.8. Bicycle and moped inspections - At request of officer.

A peace officer may at any time upon reasonable cause to believe that a bicycle or moped is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the person riding the bicycle or moped to stop and submit the bicycle or moped to an inspection and a test as appropriate. 1987

41-6-87.9. Bicycle racing - When approved - Prohibitions - Exceptions - Authorized exemptions from traffic laws.

(1) Bicycle racing on highways is prohibited under Section 41-6-51, except as authorized in this section.

(2) Bicycle racing on a highway is permitted when a racing event is approved by state or local authorities on any highway under their respective jurisdictions. Approval of bicycle highway racing events may be granted only under conditions which assure reasonable safety for all race participants, spectators, and other highway users, and which prevent unreasonable interference with traffic flow which would seriously inconvenience other highway users.

(3) By agreement with the approving authority, participants in an approved bicycle highway racing event may be exempted from compliance with any traffic laws otherwise applicable, if traffic control is adequate to assure the safety of all highway users. 1987

41-6-88. Bicycles and mopeds - Carrying bundle - One hand on handle bars.

A person operating a bicycle or moped may not carry any package, bundle, or article which prevents the use of both hands in the control and operation of the bicycle or moped. A person operating a bicycle or moped shall keep at least one hand on the handlebars at all times. 1987

41-6-89. Bicycle - Prohibited equipment - Brakes required.

(1) A bicycle may not be equipped with, and a person may not use upon a bicycle, any siren or whistle.

(2) Every bicycle shall be equipped with a brake or brakes which enable its driver to stop the bicycle within 25 feet from a speed of 10 miles per hour on dry, level, clean pavement.

41-6-90. Bicycles - Lamps and reflective material required.

(1) Every bicycle in use at the times described in Section 41-6-118 shall be equipped with a lamp on the front emitting a white light visible from a distance of at least 500 feet to the front and with a red reflector of a type approved by the department which is visible for 500 feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle.

(2) Every bicycle when in use at the times described in Section 41-6-118 shall be equipped with reflective material of sufficient size and reflectivity to be visible from both sides for 500 feet when directly in front of lawful lower beams of head lamps on a motor vehicle, or in lieu of reflective material, with a lighted lamp visible from both sides from a distance of at least 500 feet.

(3) A bicycle or its rider may be equipped with lights or reflectors in addition to those required by Subsections (1) and (2). 1987

Article 12. Railroad Trains and Safety Zones

41-6-91 through 41-6-92. Repealed.

41-6-93. Driving on tracks.

(a) It is unlawful for the driver of any vehicle proceeding upon any track in front of a railroad train upon a street to fail to remove such vehicle from the track as soon as practicable after signal from the operator of such train.

(b) When a railroad train has started to cross an intersection no driver of a vehicle shall drive upon or cross the tracks or in the path of such train within the intersection in front of such train. 1953

41-6-94. Driving through safety zone.

No vehicle shall at any time be driven through or within a safety zone. 1953

Article 13. Special Stops Required

41-6-95. Railroad grade crossing - Duty to stop - Driving through, around or under gate or barrier prohibited.

(a) Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and shall not proceed until he can do so safely when:

(1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train.

(2) A crossing gate is lowered, or when a human flagman gives or continues to give a signal of the approach or passage of a train.

(3) A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and such train by reason of its speed or nearness to such crossing is an immediate hazard.

(4) An approaching train is plainly visible and is in hazardous proximity to such crossing.

(b) No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while such gates or barrier is closed or is being opened or closed. 1953

41-6-95.5. Trains - Interference with vehicles limited.

No person or government agency shall operate any train in a manner to prevent vehicular use of any roadway for a period of time in excess of five consecutive minutes except:

(1) When necessary to comply with signals affecting the safety of the movement of trains;

(2) When necessary to avoid striking any object or person on the track;

(3) When the train is disabled;

(4) When the train is in motion or while engaged in switching operations or as determined by local authority;

(5) When there is no vehicular traffic waiting to use the crossing; or

(6) When necessary to comply with a governmental safety regulation. 1978

41-6-96. Repealed. 1978

41-6-97. Railroad grade crossings - Certain vehicles must stop - Exceptions - Regulations.

[(1)] Except as provided in subsection (2), the driver of any vehicle described in regulations issued pursuant to subsection (3), before crossing at grade any track or tracks of a railroad, shall stop within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train and shall not proceed until it can be done safely. After stopping as required and upon proceeding when it is safe the driver shall cross only in a gear which will ensure no necessity for manually changing gears while traversing the crossing and the driver shall not manually shift gears while so crossing.

(2) This section shall not apply at:

(a) Any railroad grade crossing where traffic is controlled by a police officer or human flagman;

(b) Any railroad grade crossing where traffic is regulated by a traffic control signal;

(c) Any railroad grade crossing where an official traffic-control device gives notice that the stopping requirement imposed by this section does not apply.

(3) The department of transportation shall adopt necessary regulations describing the vehicles which must comply with the stopping requirements of this section. In formulating the regulations the department of transportation shall give consideration to the number of passengers carried by the vehicle and the hazardous nature of any substance carried by the vehicle. Such regulations shall correlate with and so far as possible conform to the most recent regulation of the United States Department of Transportation. 1978

41-6-98. Duties respecting crawler type tractor, power shovel, derrick or other equipment or structure.

(1) No person shall operate or move any crawler type tractor, power shovel, derrick, roller or any equipment or structure having normal operating speed of ten or less miles per hour or a vertical body or load clearance of less than 1/2 inch per foot of the distance between any two adjacent axles or in any event of less than nine inches measured above the level surface of a roadway upon or across any tracks at a railroad grade crossing without first complying with this section.

(2) Notice of any such intended crossing shall be given to a station agent of such railroad and a reasonable time shall be given to such railroad to provide proper protection at such crossing.

(3) Before making any such crossing the person operating or moving any such vehicle or equipment shall first stop the same not less than ten feet nor more than fifty feet from the nearest rail of such railway and while so stopped shall listen and look in both directions along such track for any approaching train and for signals indicating the approach of a railroad train, and shall not proceed until the crossing can be made safely.

(4) No such crossing shall be made when warning is given by automatic signal or crossing gates or a flagman or otherwise of the immediate approach of a railroad train or car. If a flagman is provided by the railroad, movement over the crossing shall be made under his direction. 1978

41-6-99. Designation of through highways - Stop signs, yield signs and traffic-control devices - Designation of intersections as locations for preferential right-of-way treatment.

The department of transportation with reference to state highways and local authorities with reference to highways under their jurisdiction may erect and maintain stop signs, yield signs, or other official traffic-control devices to designate through highways, or to designate intersections or other roadway junctions at which vehicular traffic on one or more of the roadways should yield or stop and yield before entering the intersection or junction. 1979

41-6-100. Vehicles emerging from alleys, buildings, private roads or driveways must stop prior to sidewalk area or street.

The driver of a vehicle emerging from an alley, building, private road or driveway within a business or residence district shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across such alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon. 1978

41-6-100.10. School bus - Signs and light signals - Flashing amber lights - Flashing red lights - Passing school bus - Duty to stop - Travel in opposite direction.

(1)(a) Every school bus, when operated for the transportation of school children, shall bear upon the front and rear of the bus a plainly visible sign containing the words "school bus" in letters not less than eight inches in height, which shall be removed or covered when the vehicle is not in use for the transportation of school children.

(b) Every school bus, when operated for the

Exhibit E

UTAH CODE
ANNOTATED

1953

UTAH COURT RULES
1987

State and Federal Rules

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Advisory Committee Note. — There is no prior rule of appellate practice governing interest on money judgments This rule clarifies the date interest is calculated on money judgments that are affirmed by the court, viz , the date the judgment was entered in the district court The rule is, in part, similar to Rule 37, FRAP

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Appeal and Error § 941

C.J.S. — 5 C J S Appeal and Error § 1979

A.L.R. — Date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal, 4 A L R 3d 1221

Right to interest pending appeal, 15 A L R 3d 411

Running of interest on judgment where both parties appeal, 11 A L R 4th 1099

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A L R 4th 694

Key Numbers. — Interest ⇐ 39(2)

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** If the court shall determine that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

(b) **Disciplinary action for inadequate representation.** The court may take appropriate disciplinary action against counsel who inadequately represents his client on appeal.

Advisory Committee Note. — This rule is designed to ensure that parties and their counsel understand that frivolous or clearly unmeritorious appeals may result in the imposition of single or double costs, including attorney's fees, and damages, as well as disciplinary action against counsel

Paragraph (a) In the event that a motion made during an appeal or the appeal, itself, is determined to be frivolous or undertaken for delay, this paragraph makes mandatory the imposition of just damages and single or double costs, including a reasonable attorney's fee The paragraph adopts Rule 38, FRAP, regarding frivolous appeals, but enlarges the federal rule to include the mandatory imposition of costs for delay

Paragraph (b) This paragraph acknowledges the inherent power of the supreme court to discipline counsel in appellate proceedings who the court determines has inadequately represented his or her client The paragraph is drawn, in part, from Rule 15(c), U S Tenth Circuit Court of Appeals See also Rule 40 involving discipline of counsel and of a party who appears pro se

NOTES TO DECISIONS

Cited in Calfo v D C Stewart Co , 717 P 2d 697 (Utah 1986)

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Appeal and Error § 912

C.J.S. — 5 C J S Appeal and Error § 1358

A.L.R. — Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A L R Fed 789

Key Numbers. — Costs ⇒ 259 to 263

TITLE VI. JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS.

Rule 42. Review of judgments, orders, and decrees of Court of Appeals.

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah. (Enacted effective April 20, 1987.)

Rule 43. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.

(Enacted effective April 20, 1987.)

Rule 44. Certification and transmission of record; filing; parties.

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 45, pay the certiorari docketing fee and file, with proof of service as provided by Rule 21, ten copies of a petition which shall comply in all respects with Rule 46. The case then will be placed on the certiorari docket of the court. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

Exhibit F

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY
A PROFESSIONAL CORPORATION
SUITE 1600
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
TELEX 453149
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WRITER'S DIRECT DIAL NUMBER

March 30, 1988

Robert J. Debry, Esq.
4001 South 700 East
Suite 500
Salt Lake City, Utah 84107

Re: Robert L. Gleave vs. The Denver and Rio Grande Western Railroad Company, et al.

Dear Bob:

For the record, this letter is to confirm that on February 23, 1988 The Denver and Rio Grande Western Railroad Company and the Utah Railway Company (herein collectively "DRGW") made an unconditional offer to settle the above-referenced litigation by paying your client, Robert L. Gleave, the full amount of his judgment against DRGW, plus all accumulated post-judgment interest as of that date. DRGW offered to settle for the stated sum in consideration for a complete release of all claims and a stipulation of dismissal of the lawsuit with prejudice. As of February 23, 1988, DRGW's offer of settlement was worth $625,868.81. Thereafter, by your letter of March 2, 1988, Mr. Gleave rejected DRGW's offer and instead made a $750,000 counter-offer. Mr. Gleave demanded that he be paid over $124,000 more than the total of the judgment amount plus all accumulated post-judgment interest. Mr. Gleave said he wanted the extra settlement money to

EXHIBIT F

compensate him for his otherwise unsuccessful punitive damage claim.

DRGW believes that Mr. Gleave's rejection of DRGW's generous unconditional offer of settlement was in bad faith. DRGW further believes that Mr. Gleave wrongfully is prolonging this litigation in bad faith in the hopes of reaping an improper economic gain at the expense of both DRGW and the court system. Evidence of Mr. Gleave's bad faith is found in his frivolous motion to the Court of Appeals that he be allowed to file two petitions for reconsideration. Mr. Gleave's motion to suspend the rules was patently frivolous because the rules expressly forbid consecutive petitions for reconsideration. The lower court granted a directed verdict in favor of DRGW on Mr. Gleave's punitive damage claim, and the Court of Appeals affirmed that ruling in every respect. Both courts have held that even when all the evidence is viewed in a light most favorable to Mr. Gleave, he has not proved a valid claim under Utah law for punitive damages. Both courts have held squarely that punitive damages have no place in this case. Mr. Gleave's extreme demand for an extra $124,000 to cover his meritless punitive damage claim thus reflects bad faith under all the circumstances of this case.

A certiorari petition filed with the Supreme Court by Mr. Gleave will be further evidence of Mr. Gleave's improper tactics and motives. Rule 33 of the Rules of the Utah Supreme Court provides for "just damages and single or double costs, including reasonable attorney's fees" in cases where a litigant files a frivolous appeal or an appeal just to delay disposition of the case. DRGW's damages in this case could include but not be limited to all attorneys fees and post-judgment interest from and after February 23, 1988.

For the foregoing reasons, DRGW hereby puts you and Mr. Gleave on notice that DRGW will resist any efforts by Mr. Gleave to recover any post-judgment interest, costs, or other expenses incurred after DRGW's unconditional offer of settlement. That is, as a matter of law and equity, DRGW will resist any effort by Mr. Gleave to profit by prolonging this litigation beyond February 23, 1988. In spite of DRGW's frustration over Mr. Gleave's recent delays, DRGW remains willing to settle the case for $625,868.81, provided that the

release and settlement agreement would have to be in a form acceptable to and signed by DRGW and Mr. Gleave. Just so there is no misunderstanding, please share this letter with your client.

Very truly yours,

Patrick J. O'Hara

Patrick J. O'Hara

PJO/ce